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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

Nos. 759, 760

UNITED STATES OF AMERICA,

Petitioner,

vs.

UNITED MINE WORKERS OF AMERICA, AN UNINCORPORATED ASSOCIATION, and JOHN L. LEWIS, INDIVIDUALLY AND AS PRESIDENT OF THE UNITED MINE WORKERS OF AMERICA

Respondents

No. 781

UNITED MINE WORKERS OF AMERICA, AN UNINCORPORATED ASSOCIATION,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

No. 782

JOHN L. LEWIS, INDIVIDUALLY AND AS PRESIDENT OF THE UNITED MINE WORKERS OF AMERICA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

No. 811

UNITED MINE WORKERS OF AMERICA, AN UNINCORPORATED ASSOCIATION, and JOHN L. LEWIS, INDIVIDUALLY AND AS PRESIDENT OF THE UNITED MINE WORKERS OF AMERICA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR UNITED MINE WORKERS OF AMERICA AND JOHN L. LEWIS

Of Counsel:
JOSEPH A. PADWAY,
HENRY KAISER,
JAMES A. GLENN,
736 Bowen Building,
Washington 5, D. C.

WELLY K. HOPKINS,
EDMUND BURKE,
T. C. TOWNSEND,
HARRISON COMBS,
M. E. BOIARSKY,
15th and I Streets N. W.,
Washington 5, D. C.,
Counsel for United Mine Workers of America and John L. Lewis.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR UNITED MINE WORKERS OF AMERICA AND JOHN L. LEWIS

The Opinion of the Court Below

The United States District Court for the District of Columbia did not file any written opinion in connection with any of the orders and judgments here involved. The court's

oral opinion denying the motion to vacate and discharge the rule to show cause why defendants below should not be punished for contempt is set forth on pages 202, 203 and 204 of the Record.

Statement As to Jurisdiction

The Court has jurisdiction over these cases under the provisions of Section 240(a) of the Judicial Code, as amended, 28 U. S. C. 347(a).

The temporary restraining order was issued on November 18, 1946 (R. 69) and was extended on November 27, 1946 (R. 85). The preliminary injunction was issued on December 4, 1946 (R. 102). The judgments and sentences in the contempt cases were entered on the same day, December 4, 1946 (R. 101, 102).

Defendants below filed notices of appeal in the District Court from the judgments and sentences for contempt on December 5, 1946 (R. 496, 497), and filed a notice of appeal from the restraining orders and preliminary injunction on December 19, 1946.

On December 6, 1946, the Government filed the Record in the United States Court of Appeals for the District of Columbia (R. 554) and petitioned this court for writs of certiorari (Nos. 759 and 760) which were granted on December 9, 1946.

On December 12, 1946, the United Mine Workers of America and John L. Lewis petitioned this Court for writs of certiorari (Nos. 781, 782) to review the judgments for contempt, which were granted on December 16, 1946.

On December 21, 1946, the United Mine Workers of America and John L. Lewis petitioned this Court for a writ of certiorari (No. 811) to review the temporary restraining orders and the preliminary injunction. This Court granted the petition on December 23, 1946, and ordered that the case be consolidated with Nos. 759, 760, 781 and 782.

None of these cases have been heard, submitted to, or decided by the United States Court of Appeals for the District of Columbia and "the public interest will be promoted by a prompt settlement in this Court of the questions involved." (Rule 39, Supreme Court Rules.)

Statement of the Case

As a result of a labor dispute between the owners of the bituminous coal mines and the United Mine Workers of America, which dispute is still outstanding and unresolved (R. 235, 238, 240), the Government, on May 21, 1946, took possession of the bituminous coal mines. Thereafter the Government entered into a collective agreement with the United Mine Workers (hereinafter called the "Krug-Lewis" agreement) covering wages, hours and working conditions (R. 399). On November 15, 1946, following abortive attempts to resolve differences over the administration and application of the Krug-Lewis agreement and to negotiate improved conditions of work (R. 235, 238, 239, 271, 408-409, 410-411) John L. Lewis notified the Government that the agreement was terminated (R. 413).

On November 18, 1946, the Government filed its complaint (R. 1) for a declaratory judgment to resolve conflicting contentions between the parties respecting the terminability of the Krug-Lewis agreement (R. 6), and asking, too, for a preliminary injunction "pending the final determination of this cause"; and for a temporary restraining order "pending issuance of the aforesaid preliminary injunction" (R. 8).

To this date there has been no hearing upon the primary relief sought by the Government, namely, the declaratory judgment. On November 18, 1946, the District Court, without notice or hearing, issued a temporary restraining order to expire at three o'clock P. M., on November 27, 1946, and

set the time for hearing plaintiff's motion for a preliminary injunction at ten o'clock A. M., November 27, 1946 (R. 60). Among other things, the order prohibited defendants, their agents, servants, employees and attorneys, and all persons in concert or participation with them from permitting to continue in effect the notice terminating the Krug-Lewis agreement, from giving publicity to any such notice and from inducing or encouraging by any means or device any person to interfere by cessation of work or otherwise with the operation of the coal mines in the Government's possession.

On November 21, 1946, the District Court issued a rule to show cause why defendants should not be punished for contempt of court, and ordered a trial be held at 10:00 A. M. on November 27, 1946, in the event that it shall have been found by returns due on November 25th that defendants had not sufficiently purged the alleged contempt (R. 72).

Pursuant to the rule to show cause, defendants appeared in court on November 25th and, through counsel, denied the jurisdiction of the District Court to have issued the temporary restraining order (R. 503).

On November 26, 1946, defendants filed a motion to discharge and vacate the rule to show cause (R. 82), asserting, *inter alia*, that the restraining order was void because it was, under the Constitution and statutes of the United States, beyond the jurisdiction of the Court; that civil contempt was not appropriate in the instant case; and that proper procedures for criminal contempt had not been followed.

On November 27, 1946, the District Court, over objection and during the course of argument on the motion to discharge and vacate the rule, extended the temporary restraining order (R. 160).

On November 29, 1946, the District Court overruled the motion to discharge and vacate the rule (R. 90).

On December 3, 1946, after trial on the issues raised by the rule to show cause, the District Court found the United Mine Workers of America and John L. Lewis, individually, guilty of both civil and criminal contempt (R. 90) and, on December 4, 1946, imposed fines of $3,500,000 and $10,000 respectively. On the same day, December 4, 1946, the Court issued a preliminary injunction imposing the same restraints contained in the original temporary restraining order.

Specification of Errors

The District Court erred in the following respects:

1. In holding that the Norris-La Guardia Act (47 Stat. 70, 29 U. S. C. 101-115) and the Clayton Act (38 Stat. 738, 29 U. S. C. 52) did not apply to the instant case and did not prevent the issuance of the temporary restraining orders and the preliminary injunction.

2. In imposing restraints which deprived persons of rights guaranteed by the First and Thirteenth Amendments to the Constitution of the United States.

3. In imposing sentences for the alleged contempt of orders that were void because they were beyond its jurisdiction and because they were in conflict with the Constitution.

4. In depriving defendants below of the right of jury in the trial for the alleged contempts.

5. In holding the United Mine Workers of America, an unincorporated association, responsible for the allegedly wrongful and criminal acts of individuals in the absence of clear proof of actual participation in, or actual authoriza-

tion of, such acts, or of actual ratification of such acts after actual knowledge thereof.

6. In issuing a rule to show cause why defendants below should not be held in contempt where the said rule was supported merely by an affidavit based on hearsay and where the said rule failed to describe the proceeding as being in criminal contempt and where the said rule did not institute a separate and independent proceeding.

7. In holding the United Mine Workers of America and John L. Lewis, individually, guilty of civil contempt although the United States of America did not allege or prove any damage to private property or interest and was without special statutory authorization to bring civil contempt proceedings, and although the relief sought was punitive and not remedial.

8. In imposing fines which are arbitrary and excessive and which are in no way related to any competent evidence.

9. In holding that there was "good cause" shown for extending, on November 27, 1946, the *ex parte* temporary restraining order of November 18, 1946.

Summary of Argument.

I

A. The Norris-La Guardia Act and Section 20 of the Clayton Act are the results of the affirmative conclusion of Congress that the Government, through the courts, had greatly abused its preexisting powers in cases involving or growing out of labor disputes. To hold, as did the court below, that these statutes do not mention the Government—upon which holding the court below predicated its application of the rule of statutory construction whereby sovereignties are not included in statutes which do not specifically or by

necessary implication mention them—is, therefore, to ignore the self-evident fact that the Federal Judiciary, no less than executive agencies of the Government, is part and parcel of the Government.

B. Congress has plenary power under the Constitution to fix and limit the jurisdiction of inferior Federal courts. That power is exclusive and cannot be usurped by the Judiciary or by the Executive Department of the Government. The proposition that the anti-injunction acts do not apply where the Executive Department of the Government is a party plaintiff confounds the elementary principle that no one can alter the jurisdiction of inferior Federal courts that has been clearly established by Congress.

C. The unequivocal language of the anti-injunction acts showing that they must apply to cases instituted by the Government is overwhelmingly supported by their legislative history. The major opposition against the enactment of the Norris-La Guardia Act was premised on the point that it would bar the Department of Justice from obtaining injunctive relief in labor disputes. Amendments were offered which expressly sought to preserve the right of the Government to proceed in the manner done in this case. These amendments were overwhelmingly rejected for the all-sufficient reason that some of the most outrageous abuses perpetrated by the courts in labor disputes were in cases instituted by the Government.

D. Congress confirmed its determination to preclude the Government from obtaining injunctions in labor disputes when it enacted the War Labor Disputes Act. The legislative history of that act discloses several unsuccessful attempts to allow the Government the remedy of injunction in cases of interference by labor disputes with production in Government-seized plants. Those who advanced these

suggestions recognized and characterized them as constituting modifications of the Norris-La Guardia Act. In rejecting these suggestions Congress not only confirmed its desire to apply the anti-injunction acts to cases instituted by the Government but also made conclusively clear its intention to limit the Goverr nt in cases like the one at bar to the single remedy of criminal prosecution. This, standing by itself, compels reversal of the orders and judgments of the court below because the only possible status the Government has in these proceedings derives from the War Labor Disputes Act.

E. This and other courts have held that the Norris-La Guardia Act applies to Government suits. The Government, itself, has formally conceded before this Court that the Norris-La Guardia Act prevents it from obtaining injunctions in labor disputes. The court below made no discernible effort to distinguish the instant case from those authoritative decisions. Even if the court below may have implied some distinction by its finding that the Government was performing a sovereign function in administering the bituminous coal mines, the record establishes beyond refute that such function cannot be considered "sovereign" in the only appropriate sense that can possibly give it relevance to any of the issues in this case.

F. It has not been argued—and in the face of the record it cannot be seriously argued—that, aside from the circumstance of the Government being a party to the proceedings, the case does not involve or grow out of a labor dispute or that there has been compliance with the requirements of the Norris-La Guardia Act.

II

The restraining orders and preliminary injunction deprive persons of rights guaranteed by the First and Thirteenth

Amendments to the Constitution. They prohibit any discussion on a matter of public concern and they compel persons to work for the private profit of others against their will. The court below repeatedly indicated that the orders merely obligated John L. Lewis to cancel the notice of November 15, 1946, and did not affect the miners and other persons. But obviously, the plain language of the court's orders, and not the court's subsequent and unfounded interpretation of its meaning, determines their scope and validity. And under that plain language the miners and others were deprived of basic constitutional rights.

III

A. Since the restraining orders were void by reason of their conflict with the anti-injunction acts and the Constitution, they are nullities which cannot be contemned. The Government argued in the court below that contempt proceedings would lie for violation of the instant orders even if they were issued in violation of the Norris-La Guardia Act, relying on the decision of this Court in *U. S.* v. *Shipp*, 203 U. S. 563, and the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Carter* v. *U. S.*, 135 Fed. (2d) 858. The *Shipp* case is readily distinguishable on the ground that the jurisdiction of the court to issue the preliminary order there contemned was not limited by the Constitution or by any act of Congress. The decision in the *Carter* case is patently erroneous. If adopted by this Court, it would completely emasculate the Norris-La Guardia Act which is premised on the indisputable fact that there is no *status quo* in labor disputes. If Federal courts would be authorized to punish contempts of unlawful orders that are ostensibly designed to maintain the *status quo* then most, if not all, of the evils of "Government by injunction" would be effectively restored.

B. In emphasizing the foregoing point we show that in the instant case the court below did not maintain the *status quo*, but in affirmatively directing the cancellation of the notice of termination actually decided the merits of the primary case. *Pendente lite* relief cannot be granted where it has the effect of resolving the basic litigation particularly where, as here, the defendant is in no manner secured against resulting injury and loss. Accordingly, regardless of whether or not the anti-injunction acts apply and regardless of whether or not the restraints imposed are constitutional, the preliminary injunction should, on ordinary principles of equity, be dissolved.

C. Although we earnestly urge this Court to pass on the *Carter* rule so as to remove the confusion created by its announcement, nevertheless, even assuming that the *Carter* rule is correct, the judgments and sentences for contempt must be reversed for these reasons: (1) That rule allows punishment for criminal contempt only, whereas the court below imposed a fine for both civil and criminal contempt without allocating what portion of the fine was for the criminal contempt and what for the civil contempt. (2) Under Section 111 of the Norris-La Guardia Act the defendants below were entitled to but denied the right of trial by jury.

IV

Assuming, *arguendo*, that John L. Lewis or the individual miners did contemn the temporary restraining order of November 18, 1946, nevertheless the judgment against the United Mine Workers of America must be reversed because there has been no showing, much less the "clear proof," required by Section 106 of the Norris-La Guardia Act, that the association had actually authorized, participated in or ratified the allegedly unlawful acts of any person. Even if the Norris-La Guardia Act did not apply, there is lacking

the degree of proof necessary under common law principles to hold the United Mine Workers responsible for the unlawful acts of individuals.

V

Independent of any of the foregoing arguments the judgments in contempt must be reversed because the status of the Government in this case is not such as to entitle it to the remedial relief of civil contempt since it asserts no property interest and is not expressly authorized by any Act of Congress to institute civil contempt proceedings in a case of this kind and because the following requirements in proceedings for criminal contempt have not been met: (1) the rule to show cause was supported by an affidavit of a person other than a prosecuting officer and was based on hearsay only; (2) the proceeding was ancillary to the main cause and not a separate and independent one; (3) the requirements of Rule 42(b) of the Federal Rules of Criminal Procedure, and particularly the requirement that criminal contempt proceedings be defined as such in the pleadings, were not met.

VI

Assuming the propriety of any fines in this case, the fines actually imposed cannot be sustained because they are excessive. The fine against John L. Lewis is two times the amount fixed by Congress in the War Labor Disputes Act and the fine against the United Mine Workers of America is thirty-five hundred times that amount. And that, in spite of the fact that Congress intended that the criminal procedures prescribed by the War Labor Disputes Act shall be the sole and exclusive remedy available to the Government. In any event, a fine imposed for civil contempt must be related to the injury sustained by the plaintiff. The record in this case is entirely barren of any such relationship.

VII

It was error to extend the temporary order of November 18, 1946. Rule 65 of the Federal Rules of Civil Procedure directs courts that have issued *ex parte* restraining orders to give precedence to the hearing for the preliminary injunction over all other cases. The court below ignored that requirement by giving precedence to the hearing on the contempt issues. The court assigned the fact of that hearing as "good cause" for extending the initial order. After extending the order from the bench, the court went so far as to sign a written order stating the "good cause" to be the hearing for the preliminary injunction—a statement the inaccuracy of which is nothing less than incredible.

ARGUMENT

I

The Norris-La Guardia Act and Section 20 of the Clayton Act Apply to This Case. Their Application Here Was Rejected. Hence the Restraining Orders Are Nullities.

A. The Norris-La Guardia Act Deals With Jurisdiction of Federal Courts and Not With Plaintiffs or Their Substantive Rights. Such Jurisdiction Is Completely and Exclusively Subject to Congress' Control and Cannot Be Enlarged at the Mere Request of Any Party.

This is the first attempt on the part of the Government of the United States since the enactment of the Norris-La Guardia Act[1] in 1932 to apply the extraordinary remedies of

[1] The Norris-La Guardia Act (47 Stat. 70) is printed in full on pages 43-52 of the appendix to the Government's petition. Section 20 of the Clayton Act (38 Stat. 738) is set forth on page 52 thereof. That these two statutes are directly related and that they must in effect be read as a single text is established by *U. S.* v. *Hutcheson*, 312 U. S. 219.

The Congressional Committee reports on the Norris-La Guardia Act may be found in the appendix to this brief.

ex parte restraining orders and contempt proceedings against a labor organization and its officials in a situation which clearly and on its face contains all the familiar elements of a labor dispute.

Respectfully and earnestly we assert that the Government in instituting these proceedings and the court below in completely adopting the theories, arguments and recommendations advanced by the Government disregarded completely the plain, unequivocal language of the federal anti-injunction statutes, their indisputable purpose and scope and the controlling decisions of this Honorable Court. So much so, as reluctantly to compel the suggestion that public hysteria and political expediency, rather than the dispassionate and judicial application of established legal principles, have thus far dominated and determined these proceedings.[2]

In ruling that the anti-injunction statutes were inapplicable to the instant case the court below relied exclusively on the principle that "where the Government was not specifically mentioned or included by necessary implication . . . the language of the act did not apply to the Government" (R. 202). Even if we accept the propriety of the principle so enunciated, it is clear that it has been completely misapplied by the court below.

The courts of the United States—no less, certainly, than the Department of Interior or the Department of Justice—are part and parcel of the "Government". The Norris-La Guardia Act not only mentions the Government, it is expressly designed to limit the powers of Government as

[2] "A community whose judges would be willing to give it whatever law might gratify the impulse of the moment would find in the end that it had paid too high a price for relieving itself of the bother of awaiting a session of the legislature and the enactment of a statute in accordance with established forms." Mr. Justice Cardozo, in *Doyle* v. *Hofstader*, 257 N. Y. 244, 268.

theretofore exercised by a fundamental branch of Government, the courts. Indeed, it would be difficult in the extreme to conceive of any legislation that is more directly and pointedly addressed to the limitation of governmental powers.

The Norris-La Guardia Act is styled "An Act to amend the Judicial Code and to define and *limit the jurisdiction of courts* sitting in equity . . .". (Emphasis supplied.) It was "intended drastically to curtail the equity jurisdiction of Federal Courts in the field of labor disputes" (*Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91, 101) in order to put a conclusive terminus to "abuses of judicial power in granting injunctions in labor disputes" (*Ibid.*, quoting from S. Rep. No. 163, 72nd Cong., 1st Sess., p. 8). If—as cannot be denied—Congress in the full and lawful exercise of its constitutional powers [3] qualified a specific judicial power, it is beyond conception that the qualification could be destroyed upon the mere request of an executive agency of Government. "The judicial power of the United States . . . is . . . dependent for its distribution and organization, and for the modes of its exercise, *entirely upon the action* of Congress," (emphasis supplied), *Cary* v. *Curtis*, 3 How. 236, 245,[4] and not upon the caprice, demand or formal action of any other branch of government.

The court below sought to apply the ancient English rule of statutory construction and interpretation that "The

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[3] Art. III, Secs. 1 and 2; Frankfurter & Greene, *The Labor Injunction*, 210, 211; Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior Courts"—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1059; Frankfurter & Greene, *Congressional Power Over The Labor Injunction*, 31 Columbia L. Rev., 385, 407-408.

[4] See also *Sheldon et ux.* v. *Sill*, 8 How. 441; *Ex Parte Robinson*, 19 Wall. 505; *Holmes* v. *Goldsmith*, 147 U. S. 150; *Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 233-5. *Myers* v. *United States*, 272 U. S. 52, 128.

King is not bound by any Act of Parliament unless he be named therein by special and particular words" (R. 202).

This rule of statutory construction, and it is no more than that,[5] had perhaps its earliest and certainly its most elaborate discussion and elucidation by Lord Chief Justice Coke in the case of the *Master and Fellows of Magdalen College in Cambridge*, 11 Coke 66b, decided about 1612.

In holding that the sovereign was bound by the Act there in question, the Lord Chief Justice relied upon an exception to the general rule even then widely recognized and applied (p. 72a):

> "That the King shall not be exempted by construction of law out of the general words of Acts made to suppress wrong; because he is the fountain of justice and common right, and the King being God's Lieutenant cannot do a wrong."

He referred to the cases of *Alton Woods*, 1 Coke 44b, and *Lord Berkley*, Pl. Com. 246, where there was in question the application to the King of the statute *de donis* in which he was not expressly named and which gave a remedy for the wrongful alienation of estates tail. In these cases it was adjudged that the King was bound by the Act and the first of the reasons given was that

> "Because such alienation before the statute was wrongful, although such wrong wanted remedy; and there it is said, it would be a hard argument to grant, that the statute which restrains men from doing wrong and ill, should permit the King to do it."

Wrongful subversion of the traditional equity jurisdiction by courts of the United States in cases involving or growing out of labor disputes was the evil sought to be remedied by the Norris-La Guardia Act. Since, for the

[5] *Green* v. *United States*, 9 Wall. 655, 658; *United States* v. *Cooper Corporation*, 312 U. S. 600.

purpose of correcting that evil, the Congress saw fit to withdraw certain jurisdiction from the courts, it would, indeed, to use the mild language of Lord Coke, "be a hard argument to grant" that only the Government should be permitted to perpetuate the evil and the wrong (*Nardone* v. *U. S.*, 302 U. S. 379, 384; *U. S.* v. *Arizona*, 295 U. S. 174, 184), even to the extent of invoking a jurisdiction which no longer exists.

This Court has on many occasions applied to sovereign bodies statutes not specifically mentioning them even where those statutes were in derogation of their substantive rights.[6] How much stronger is the compulsion to apply to such sovereign bodies an act dealing directly with jurisdiction, emphasizing procedural requirements and growing out of abuses in cases where the Government was the complaining party.

In *United States* v. *Rice*, 327 U. S. 742, the majority of this Court[7] held (p. 773):

> "To whatever extent the Government may be excluded from the operation of a statute in which it is not named, it is clear that the United States cannot assert, by virtue of its sovereignty, a right of appeal

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[6] *New York* v. *United States*, 90 L. Ed. 265 (Adv. Sheets); *South Carolina* v. *United States*, 199 U. S. 437; *Cook County National Bank* v. *United States*, 107 U. S. 445; *Allen* v. *University System*, 304 U. S. 439; *United States* v. *California*, 297 U. S. 175; *Helvering* v. *Powers*, 293 U. S. 214; *Ohio* v. *Helvering*, 292 U. S. 360.

[7] The reasoning of the minority in that case cannot apply here. The dissent was premised on the argument that the Act of April 12, 1926, 44 Stat. 239, c. 115, granting the United States the right to remove to federal courts suits involving a property interest of a restricted Indian of the Five Civilized Tribes should not be governed by a prior statute passed in 1887 (24 Stat. 552, c. 373) which disallows appeals from orders remanding causes removed from the state courts. It was argued that the more recent act, being "an independent statute," should not be governed by the older act, particularly where the evil sought to be eliminated by the older act would not be revived by Government appeal from the order remanding the case back to the state court. In the instant case, of course, there is nothing comparable to the 1926 statute which affirmatively confers an express right upon the Government. Moreover, as will be abundantly

> which no statute has conferred, or which, if conferred, has been abolished."

In *Green* v. *United States, supra,* involving a procedural question it was "urged that the Government is not bound by a law unless expressly named". This Court flatly rejected that contention, saying (p. 658):

> "We do not see why this rule of construction should apply to acts of legislation which lay down general rules of procedure in civil actions. The very fact that it is confined to civil actions would seem to show that Congress intended it to apply to actions in which the Government is a party, as well as those between private persons."

See also *Custer* v. *McCutcheon,* 283 U. S. 514; *Fink* v. *O'Neil,* 106 U. S. 272; *United States* v. *Union Pacific R. R. Co.,* 105 U. S. 263; *United States* v. *Knight,* 14 Pet. 301, 10 L. Ed. 465.

There is no difference in the arrogation of jurisdiction in this case by the court below than one, say, wherein the Government should apply to a Federal District Court to hear a case over which the Supreme Court has exclusive original jurisdiction under Article III of the Constitution. As shown, Congress alone has Constitutional power to fix the jurisdiction of "inferior courts". Congress, having found that intervention by Federal courts in labor disputes by way of restraining orders and injunctions had been much abused, determined that the Federal courts should thereafter function in such matters only with completely defined procedural and substantive safeguards. Federal courts were deprived of power to act otherwise than in strict conformity with such safeguards no matter who the plaintiff

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demonstrated, the evils sought to be eliminated by the Norris-La Guardia Act were extremely conspicuous in cases involving the Government, cases which were the subject of elaborate comment and criticism throughout the legislative debates.

may be.[8] For otherwise, we should be forced to the impossible and even absurd proposition implicit in the decision of the court below, namely, that the Federal courts may not abuse their equity jurisdiction except when some Federal agency requests them so to do! And that, in spite of the fact that among the abuses expressly condemned by Congress were those incident to labor injunctions obtained by the Government.

B. The Legislative History of the Norris-La Guardia Act Clearly Establishes That It Applies to Suits Instituted By the Executive Department of the Government.

During the course of the debates in the House of Representatives[9] the principal argument against passage was directed at the very point here involved—the application of the Act to the Government. Representative Beck was the outstanding opponent of the bill. He discussed at length[10] the *Debs* case[11] which involved an injunction obtained by the then Attorney General and described it as "the cause célèbre from which sprang this agitation to de-

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[8] See *Schivera* v. *Long Island Lighting Co.* (decided by the New York Court of Appeals on October 3, 1946, and reported in 18 L. R. R. M. 2479). The court said (p. 2481):

> "That statute, like its prototype, the Federal Norris-La Guardia Act, prohibits the issuance of any injunction . . . . like the one here granted. . . . Jurisdiction to issue any such injunction is, in so many words, denied to the courts. *It makes no difference who is the plaintiff. There is no jurisdiction to issue such an injunction on anyone's application.* Such are the plain words of the statute, and the obvious intent makes it even plainer." (Italics supplied)

[9] 75 Cong. Rec. 5462-5511.

[10] 75 Cong. Rec. 5472, 5476.

[11] *In Re Debs*, 158 U. S. 564. "As for the *Debs* case," upon which the Government heavily relies in this case (R. 55) "what dispassionate student of American Society really believes that that case, in its sequelae, has made for peace in industry or enhanced confidence in the legal order?" Frankfurter & Greene, *Congressional Power Over The Labor Injunction*, 31 Columbia L. Rev. 385, 412.

stroy the power of the Federal courts to issue such injunctions."[12] Anxiously desiring that this governmental power be retained, he observed: "'If the bill now under consideration had then been a law, such summary action would have been impossible", a statement of particular significance in view of his experience and high standing as a lawyer and as former Solicitor General. He likewise discussed at length the railway shopmen's strike[13] of 1922 when he was Solicitor General and, pointing out that in that case, too, injunctions were issued at the instance of the Attorney General, made clear that such injunctions could not be obtained under the provisions of the bill.[14]

Mr. La Guardia made clear the imperative need to apply the remedial legislation he was sponsoring to cases brought by the Government by his sharp criticism[15] of the manner in which Attorney General Daugherty obtained the notorious Wilkerson injunction (p. 5479):

> "Let me tell you how that was obtained—this is not hearsay, not from what somebody else tells me, but from the 'inside story' as told by Harry Daugherty himself. . . . Daugherty says in his book:
>
> "'After looking around for a judge, Judge Wilkerson was finally selected. He was out of the city, but

[12] 75 Cong. Rec. 5476.

[13] *U. S.* v. *Railway Department Employees*, 286 Fed. 228 (N. D. Ill.).

[14] 75 Cong. Rec. 5473.

[15] See also, Frankfurter, *Law and Politics* (1939), which reprints an article (p. 218) *"Labor Injunctions Must Go"*, first published in 1922: "Never in American history has an appeal by the Government to the courts . . . been received with such widespread condemnation as the injunction granted to Attorney General Daugherty at Chicago. Criticism does not abate with time nor with reflection. . . . The simple truth is that Harry M. Daugherty . . ., with the complicity of Judge Wilkerson, has set himself above the Constitution, and by his own fiat has prohibited conduct which Congress deliberately refused to declare illegal. . . . What's the Constitution between friends!—even though one of them happens to be the Attorney General of the United States and the other a Federal judge."

> came back to Chicago. I . . . was most fortunate in getting Wilkerson. He had long been in the service of the Government as district attorney. . . . He agreed with me on every point and granted the temporary injunction without a minute's delay.'
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> ". . . That is the history of the Wilkerson injunction. . . . Under our bill, instead of bringing these perjured affidavits . . ., he would have had to bring the witness to court, . . . before the temporary injunction could have been issued."

Mr. Beck concluded his earnest plea to save the Government's right to obtain injunctions by saying (p. 5500):

> "Now you gentlemen can reconcile with your consciences as you will—and your motives are just as high as I claim for myself—the passage of this law. I rejoice that I was able to be in the House today to protest against it. I would protest against it as *an impeachment of the sovereign powers of the United States Government in its own courts*, if I were the only man here to do it." (Italics supplied.)

As leader of the opposition, he offered an amendment the underlying theory of which was precisely the Government's theory in this case.[16] After debate, his amendment was rejected on a division by vote of 155 to 63 (p. 5505).

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[16] He suggested this language (p. 5503):

> "Provided, however, that neither this section nor any subsequent section of this bill shall apply to any labor dispute which involves the suspension or discontinuance of a public utility whose continuous operation is essential to the property, health, and lives of the people of any State or community. In such cases where the welfare, health or lives of a public are concerned who are not parties to such labor dispute, or where a labor dispute involves the obstruction of any instrumentality of interstate or foreign commerce, in such event the power of a United States court to grant injunctive relief in the interests of the public in accordance with the principles of equity jurisprudence shall not be denied or abridged, anything in this act to the contrary notwithstanding."

Congressman Blanton of Texas offered an amendment expressly to "except" from the bill cases "where the United States Government is the petitioner". This amendment, too, was voted down by a vote of 125 to 21 (p. 5503).

Ordinarily, Congress would, doubtless, have been extremely reluctant before turning down proposals designed to preserve governmental functions and the public welfare. But Congress was not functioning *in vacuo*. Senators and Members of the House of Representatives had before them and thoroughly discussed [17] the sordid history of several instances of extreme abuses in injunctions obtained at the behest of the Government.[18] It was because of that concrete experience that Congress so overwhelmingly voted

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[17] In addition to the references to the Congressional Record already made see 75 Cong. Rec. 4693, 5001, 5005, wherein several Senators referred to cases involving government injunctions, and p. 5490 where Congressman Celler inveighed against the "all embracing" *Wilkerson* injunction and the manner in which it "destroyed the bill of rights contained in our constitution".

The Senate Committee reporting the bill illustrated the "abuses of judicial power" in "the use of the injunction" which had been "growing by leaps and bounds" as follows: "For example, approximately 300 were issued in connection with the *railway shopmen's strike of* 1922 . . . (Frankfurter on 'The Labor Injunction' p. 52)". (Italics supplied.) S. Rep. No. 163, 72 Cong. Rec. 1st Sess. p. 8.

See also Frankfurter & Greene, *The Labor Injunction*, pp. 103, 115, 174, 218, 253, which are devoted in the main to a close examination and criticizing analysis of the *Wilkerson* injunction.

[18] Government injunctions, other than in the *Debs* and *Railway Shopmen's* cases, that were obtained prior to the enactment of the Norris-La Guardia Act are: *United States* v. *Workingmen's Amalgamated Council of New Orleans, et al.*, 54 Fed. 994, 57 Fed. 85; *United States* v. *Debs*, 64 Fed. 724, 158 U. S. 564; *United States* v. *Elliott*, 62 Fed. 801, 64 Fed. 27; *United States* v. *International Brotherhood of Electrical Workers, Local Unions Nos. 9 and 134, et al.* (U. S. D. C., N. D., Ill.) (unreported, petition filed February 24, 1913; final decree entered February 27, 1914); *United States* v. *Hayes* (U. S. D. C. Ind., November Term, 1919), in Equity No. 312; *United States* v. *Bricklayers, Masons & Plasterers International Union of America* (U. S. D. C., S. D. N. Y.), petition filed February 28, 1922. See 4 *Law and Labor* 95. *National Association of Window Glass Manufacturers et al.* v. *U. S.*, 263 U. S. 403.

down these otherwise superficially reasonable amendments. Congress was firmly determined to prevent the recurrence of what it considered to be outrages perpetrated by the judiciary precisely in cases initiated by the Government of the United States and to foreclose invocation by the Executive Department of the Government of the power sought to be invoked in this case.

As opposed to this decisive legislative history the Government merely offers the fragmentary statements of two Congressmen made in the course of debate in one of the branches of Congress (R. 57).. The rule is clear that legislative debates cannot be resorted to for the purpose of construing a statute[19] contrary to the natural import of its terms. *United States* v. *Shreveport Grain and Elevator Co.*, 287 U. S. 77; *Railroad Commission* v. *C. B. & Q. Railway*, 257 U. S. 563. Like other extrinsic aids to construction, their use is "to solve, but not to create, an ambiguity". *Hamilton* v. *Rathbone*, 175 U. S. 414, 421; *Caminetti* v. *United States*, 242 U. S. 470. When, as here, the language of an act is clear, it will be given effect in its natural and obvious sense. *United States* v. *Shreveport Grain and Elevator Co., supra; Rex* v. *Navigation Commissioners*, 5 Ad. & El. 804, 816; 111 English Reprint 1370; *United States* v. *Lexington Mill and Elevator Co.*, 232 U. S. 399. "Statutory language and

[19] In determining the legislative intent and purpose of an enactment, its language is first of all to be considered, in its natural and ordinary signification, and if there is no obscurity or ambiguity on the face of it, there is neither occasion nor justification for any process of construction, but the statute must be applied and enforced exactly as it stands. (Black on *Interpretation of Laws* (2nd Ed.), p. 142, and cases cited.) To say that the language of the Norris-La Guardia Act means to except suits brought by the United States is not to construe the statute but to add an additional and qualifying term to its provisions. This the courts are not at liberty to do under the guise of construction because where the words are plain there is no room for construction. (*Osaka Shoshen Kaisha Line* v. *United States*, 300 U. S. 98; *Crooks* v. *Harrelson*, 282 U. S. 55; *Hamilton* v. *Rathbone*, 175 U. S. 414.)

objective, thus appearing with reasonable clarity, are not to be overcome by resort to a mechanical rule of construction, whose function is not to create doubts, but to resolve them when the real issue or statutory purpose is otherwise obscured." *U. S.* v. *Rice, supra,* 775.

However, even assuming that some weight ought to be given to those isolated statements of Congressmen La Guardia and Michener upon which the Government relies, a close examination of the actual remarks made and the context in which they were made shows that they were speaking of possible disputes between the Government as sovereign employer and usual, sovereign employees of the Government. We shall show that no such relationship exists in the instant case; that, indeed, the Coal Administration has officially ruled that miners working in the bituminous coal mines are not to be regarded as Government employees.

However that may be, what is controlling, of course, is the clear language of the statute itself. Surely, had there been any intention to permit the Executive Department to seek and obtain injunctions in labor disputes it would have been an exceedingly simple matter for Congress to have noted that exception. "It is hard for us to believe that Congress meant us to read 'shall have jurisdiction' where it had carefully written 'but shall not have jurisdiction.' The command 'thou shalt not' is usually rendered as to forbid and we think here it was employed without subtlety or contortion and in its usual sense." *Connecticut Light and Power Co.* v. *Federal Power Commission,* 324 U. S. 515, 528-9.

Nothing can be more conclusive of the firm belief that the Congress had by the Norris-La Guardia Act precluded the Government from obtaining injunctions in labor disputes than the action taken by Congress three years later when it passed the National Labor Relations Act (29 U. S. C. 152).

Under that act the National Labor Relations Board—which is to say, the Government—is authorized to petition Circuit Courts for the enforcement of its orders "and for appropriate temporary relief or restraining order" (Sec. 10(e)). Congress was not even content to rely on the fact that the Norris-La Guardia Act, having been passed prior to the National Labor Relations Act, would not prevent the Government from proceeding by injunction to enforce its orders under the later statute. So clear was Congress' belief that the Norris-La Guardia Act barred Government injunctions in labor disputes that it went out of its way to provide for a special exception in cases brought by the Government against employers arising under the National Labor Relations Act:

> "Sec. 10 (h). When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,' approved March 23, 1932 (U. S. C. Supp. VII. Title 29, secs. 101-115)."

C. The Legislative History of the War Labor Disputes Act Shows Conclusively That the Anti-Injunction Acts Apply to this Case.

The resort by the Government to the injunctive process in this case and its success in the court below constitute, we respectfully submit, one of the most patent and gross perversions of Congressional intent in the history of this country. We say that because the only conceivable status the Government has as a party to this case—and this will not be denied—derives from its seizure of the mines under the

War Labor Disputes Act (Act of June 25, 1943, C. 144, 57 Stat. 163), and the debates in both Houses of Congress during the consideration of that Act make it clear beyond the slightest doubt that *Congress recognized both that the Norris-La Guardia Act applies to Government-sought injunctions and that interferences with production in Government-seized plants were to be prevented and punished by criminal prosecutions alone.*

When Senate Bill 796 was introduced an amendment was offered whereby the Government could "restrain violations or threatened violations of this act" (89 Cong. Rec. 3809). Thereupon Senator Reed suggested a broader amendment which would permit private persons engaged in essential war production also to seek injunctive relief (p. 3810). On May 4, 1943, Senator Connally offered a substitute to his original bill. Section 5 of the substitute provided for injunctions at the behest of the Government (p. 3882).

Senator Barkley, speaking of the suggestion to allow Government injunctions, stated:

> ". . . if adopted, *it would wipe out the Norris-La Guardia Act or nullify it,* . . ." (P. 3900) (Italics supplied.)
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> "The measure *invokes the injunctive process by the Attorney General of the United States.* It provides that he may obtain an injunction. For years and years we have debated in the Senate and House of Representatives, and all over the country, whether labor disputes ought to be settled by the injunction process. *Congress has passed legislation against such procedure, and that legislation, known as the Norris-La Guardia Act, is now on the statute books.* Both major political parties have declared against regulation of labor by the injunction process over a period of a quarter of a century or more." (P. 3901) (Italics supplied.)

Senator Vandenberg stated (P. 3906):

> "I am very anxious that there shall be additional statutory protection to the uninterrupted production of war necessities, but I am wondering whether in order to achieve that purpose it is necessary for me to impinge upon a very profound hostility I have always had to the use of injunctions in labor disputes. I voted for the original Norris-La Guardia Act, and I have always felt that one of the most useful things we ever did, not only as a matter of fair play, but in respect to the status of the courts was substantially to separate from court jurisdiction the responsibility of, in effect, umpiring labor disputes.
>
> "What I wish to ask the able Senator from Texas, if I may, is this: In his proposal, on page 4, it is provided that any person who willfully violates any provision of the act is to be guilty of a felony, and subject to a fine or imprisonment. *Is not that a conclusive penalty? Is it necessary in addition to go back into all the old injunctive process in connection with labor disputes?*" (Italics supplied.)

On May 5th, 1943, the Reed Amendment was rejected (p. 3986). On the same day it was proposed by Senator Danaher (p. 3988) that Section 5 of the Connally substitute, relating to Government injunctions, be stricken. He stated (p. 3988):

> "Mr. President, *Section 5 will undo Federal legislation with reference to the jurisdiction of the courts as to injunctions*, and I believe, sir, that we will be doing our cause no good, and that we shall incite great mistrust of the whole bill." (Italics supplied.)

Senator Connally urged that Senator Danaher's recommendation be rejected and stated (P. 3988):

> "The provision is limited to plants which the Government takes over. It would not change the Norris-La Guardia Act in any respect, *except in the one particular case . . .*" (Italics supplied.)

Senator Danaher answered (P. 3988):

> "Mr. President, I do not wish to argue the point, but certainly those of us who, as attorneys, have watched the progress of injunction cases in the courts down through the years cannot but be filled with dismay at the thought of giving a rule of law application in one set of circumstances and not in another. . . . But with reference to the use to be made of injunctions, with reference to contempt citations for violations of the injunctions, and with reference to accomplishments of what someone in the Department of Justice decides shall be done, the effect is the same . . . there is no place in this type of bill, proceeding from this particular philosophy, for the use of the injunctive remedy."

At this point of the debate Senator Vandenberg observed (P. 3988):

> "I think the Senator should point out that the elimination of Section 5 would not take the teeth out of the bill, however, *because the preceding punitive criminal section would still remain.*" (Italics supplied.)

Senator Langer inquired specifically (P. 3989):

> Mr. President, is it not true that unless section 5 is stricken from the bill that a portion of the Norris-La Guardia Act will be repealed?"

To which Senator Danaher replied:

> "It would certainly be overridden; let us put it in that way."

Senator Langer then propounded:

> "Would we then not have the same situation we had a few years ago when the Attorney General of the United States applied to Judge Wilkerson in Chicago, which led to the same situation which the Senator from Montana discussed a while ago?"

Upon a request for a division the provision allowing Government injunction was stricken (P. 3989).

When Senate Bill 796, as originally adopted by the Senate, was sent to the House for its concurrence, a discussion took place as to the use of injunctive relief. Mr. Thomason stated (89 Cong. Rec. 5300):

> "I oppose injunctions just as I did 'yellow dog' contracts."

Representative Celler expressed himself on the question of injunctions in connection with the War Labor Disputes Act as follows (P. 5325):

> ". . . I want to warn members of the committee that section 6 gives us back again the obnoxious labor injunctions which were banned after many years of striving and struggle, by the passage of the Clayton Act and the Norris-La Guardia Act. Remember we had consigned labor injunction to limbo. Now they are to be brought back to plague labor."

The House refused to agree to Senate Bill 796 as passed by the Senate but passed it with certain amendments thereto (See Cong. Rec. 5392).

Thereafter a conference committee of the two Houses agreed upon a bill which became the War Labor Disputes Act and which omitted any of the previous provisions relating to injunctions. In urging its adoption before the House of Representatives, Congressman Harness stated (P. 5732):

> "I ask labor to note, too, that there is in this measure none of the drastic features of previous proposals in the House to which it raised particular objection, such as prohibitions against picketing, jurisdictional strikes, sympathy strikes, the *suspension of the Norris-La Guardia Act*. . . ." (Italics supplied.)

There can be no doubt, in the face of that history, but that Congress, having fully considered the advisability of allowing injunctive relief in cases of interference with production in plants seized by the Government under the War Labor Disputes Act, decided to continue in full force and effect the language and philosophy of the Norris-La Guardia Act and to prevent Government injunctions in precisely the type of case here involved.

D. This and Other Courts Have Ruled That the Anti-Injunction Acts Applied To Restraining Orders and Injunctions Sought by the Government; and the Government Itself Has Conceded That They Do.

The Court below made no effort whatever to distinguish the instant case from controlling decisions holding that the anti-injuction acts do apply to cases where the Government seeks injunctive relief in labor disputes.

In *United States* v. *Hutcheson*, 312 U. S. 219, this Court said:

> "... Concededly an injunction either *at the suit of the Government* or of the employer could not issue." (P. 227) (Italics supplied.)

and,

> "... *neither the Government* nor Anheuser-Busch *could have sought an injunction* against the acts here challenged, ..." (P. 235) (Italics supplied.)

In *United States* v. *Weirton Steel Company*, 7 Fed. Supp. 255, the Court said:

> "It is contended that the act is not applicable to a suit wherein the United States is complainant. The act deals with labor disputes. It is immaterial who the complainant may be if a labor dispute is involved and the defendant is a party thereto."

In *United States* v. *American Federation of Musicians*, 318 U. S. 741 (affirming 47 Fed. Supp. 304 (N. D. Ill)), this Honorable Court directly applied the Norris-La Guardia Act to a suit for injunction instituted by the Government.

See also *Anderson* v. *Bigelow*, 130 F. (2d) 460, certiorari denied, 317 U. S. 690, wherein it was held that a bankruptcy receiver appointed by a Federal court was not entitled to injunctive relief which a private employer could not get in the Federal courts under the Norris-La Guardia Act.

The Government, itself, has affirmatively taken the position before this Honorable Court, as recently as April, 1946, that the anti-injunction acts prevented it from obtaining injunctions in cases involving labor disputes. Thus, in the brief of the United States on reargument of the case of *United Brotherhood of Carpenters and Joiners of America* v. *United States of America* (Nos. 6-10) it is stated (p. 6):

> "That suits by the Government are not exempt from the Act *is clear from its history.* Among the instances of the abuse of the injunctive process which Congress had in mind was *the injunction obtained by Attorney General Daugherty from Judge Wilkerson* in the shopmen's strike in 1922. And in *United States* v. *Hutcheson*, 312 U. S. 219, 227, the Court stated that 'Concededly an injunction either at the suit of the Government or of the employer could not issue.' (Italics supplied)."

This amazing *volte face* on the part of the Government, this repudiation of a position recently and formally taken before this Court, can only be described as an abject surrender to political expediency. It hardly savors of that degree of consistency which citizens of this country have every right to expect from highly placed public officers in the Department of Justice.

E. The Government Is Not Here Performing a Sovereign Function.

The court below concluded that in seizing and operating the mines the United States "was at all times exercising its sovereign functions derived from the Constitution and laws of the United States" (R. 98, 99).

Before discussing the validity of that conclusion it is well to inquire into its relevance. Possibly it represents an attempt to distinguish the instant case from the *Hutcheson, American Federation of Musicians* and *Weirton* cases, *supra*. But such a distinction necessarily implies the impossible suggestion that in those cases the Government was not acting *qua* government but, rather, was expending governmental funds solely for the benefit of private employers who were in dispute with their employees in those cases.

Perhaps, however, the Government is arguing that the point of distinction lies in the fact that in the instant case the Government is, in effect, the employer, and hence, to quote the Government, "here there is not and cannot be a bona fide labor dispute . . . for the sovereign, in the exercise of its functions, can at no time be held to be engaged in a labor dispute with private persons" (R. 57).

Probably, by that vague statement the Government is trying to argue that this case is factually distinguishable because here the Government has seized the mines under the War Labor Disputes Act. But—as we now proceed to show—the nature of the governmental function here involved is not such as to have any possible relevance to the issue of the applicability of the anti-injunction acts.

In a literal sense, everything any branch or official of the Government does may, of course, be described as a sovereign function. But where the concept of sovereignty has true legal relevance this Court has been most careful to limit and concretize its meaning. See, for example,

New York v. *United States*, 90 L. Ed. 265 (Adv. Sheets); *South Carolina* v. *United States*, 199 U. S. 437; *Ohio* v. *Helvering*, 292 U. S. 360. Assuming that sovereignty is a relevant issue in this case—which we deny because of the history and language of both the Norris-La Guardia and War Labor Dispute Acts—still to have any significant meaning the Government's function in administering the bituminous coal mines must be "sovereign" in the same sense as, say, the function of the Government in raising armies. It is only as to such traditional and vital governmental functions that it may be said, with any degree of reason or cogency, that labor disputes or similar interferences will not be permitted.

As to that, we say that the conclusion of the court below that the Government is here performing a "sovereign function" confounds common knowledge and completely ignores the record in this case. We categorically state—and this is fully supported by the record—that, far from being "sovereign" in any significant sense, the Government's role in administering the bituminous coal mines is for the most part fictional and for the remainder nominal only.

Is it conceivable that a sovereign power will publicly articulate its urgent desire to return a vital "sovereign" function back to private persons? Is it conceivable that a sovereign power will turn over the profits resulting from their own "sovereign" functions to private persons? Is it conceivable that a sovereign power will impose a tax on the income derived from the performance of a "sovereign" function or that it will permit other sovereignties to tax such income?

The mere posing of these questions utterly dissipates whatever value there may be in the conclusion of the court below and sharply shows its untenability. All these fac-

tors, completely alien to the concept of sovereignty in the limited and only appropriate sense that it must be used here, are indisputable factors in this case.

Government's Exhibit 13 (R. 399-403), the so-called "Krug-Lewis agreement", incorporating as it does agreements previously made with the private owners of the coal mines, affirmatively maintains a union-shop condition in the bituminous coal mines, something unusual as respects ordinary, "sovereign" employees. In addition, the Krug-Lewis agreement, like Executive Order No. 9728 (R. 335), shows on its face that the Government's participation was necessarily temporary, whereas sovereign functions survive as long as the sovereign power itself does.

Government's Exhibit 20 (Capt. Collisson's letter to Lewis of October 22, 1946, R. 410) states in part as follows:

> ". . . . Such an agreement would accomplish the result which has been publicly expressed as the desire of the Coal Mines Administration, the United Mine Workers, and the operators, *namely, the return of the mines to private operation.*" (Italics supplied.)

Similarly, Exhibit "J" of the Government's complaint (letter from Secretary of the Interior Krug to Lewis of November 14, 1946, R. 30) states in part as follows:

> ". . . .certain of your proposals are of such a fundamental nature that they should be directed *to the owners and private operators* of the bituminous coal mines rather than to the Government, which *is only the interim custodian* of these properties.
>
> • • • • • • •
>
> ". . . I am convinced that any substantial change in wage rates and hours of employment made by the Government at this time would postpone for an indefinite period the return of the mines to their owners, . . .
>
> • • • • • • •

"'. . . It would . . . be inimical to the best interest . . . of the country, *should the Government prolong indefinitely its temporary role as a substitute for one of the parties* in the collective bargaining which must be the foundation of a healthy coal industry.'' (Italics supplied).

The foregoing irrefutably establishes the temporary nature of the Government's role and its urgent desire to return this so-called "sovereign function" back to private persons and groups.

Pursuant to regularized and established procedures in all cases where, under the War Labor Disputes Act, the Government had taken over the administration of certain industries, the Government in the instant case issued formal "regulations for the operation of coal mines under Government control" which are published in the Federal Register [20] and which were the subject of cross-examination of Government's witness, Captain Collisson (R. 231-234).

Section 5 of the aforementioned regulations provides:

"*All properties in the possession of the Government shall be operated in a manner consistent with the fact that title to the properties remains in the owners thereof* . . ." (Italics supplied.) (R. 231.)

Section 40 of the regulations provides in part as follows:

"None of the provisions of this Section 40, and no action that shall be taken pursuant to any of them, shall be deemed to constitute acquiescence by the Administrator in any claim that operations during the period of Government possession and control were for the *financial account of the Government.*" (Italics supplied.) (R. 232.)

[20] 8 Fed. Reg. 6655, 10712, 11344, 17339.

By these regulations the mine operators have been authorized to retain whatever profits may accumulate during the time the Government administered the mines.[21]

Section 23 (d), standing by itself, we respectfully submit, is entirely conclusive of the issue of sovereignty in this case. It provides:

> ". . . *nothing in these regulations shall be construed as recognizing such personnel as officers and employees of the Federal Government within the meaning of the statutes relating to Federal employment.*" (Italics supplied.) (R. 233.)[22]

The workers in the bituminous mines not being sovereign employees, the case of the Government necessarily collapses.

Section 24 of the regulations provides in part as follows:

> ". . . *The companies are expected to meet all Federal, State and local taxes, contributions, and assessments, in the customary manner.*" (Italics supplied.) (R. 234.)

We need hardly remind the Court that income of the Federal Government derived from a "sovereign function" may

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[21] *See Warner Coal Corporation* v. *Costanzo Transportation Co.*, 144 Fed. (2d) 589 (C. C. A. 4, 1944), Certiorari denied, 323 U. S. 791, where it was held that the seizure of the mines by the Government did not prevent the coal company from being adjudged a bankrupt.

[22] In *Stanton* v. *Ruthbell Coal Co.*, 34 S. E. (2d) 257 (W. Va. 1945) involving an action to recover damages for death while decedent was employed in a coal mine seized by the Government, the court rejected the contention that the United States Government was decedent's employer. Quoting from the decision of this Court in *Missouri Pacific R. Co.* v. *Ault*, 256 U. S. 554, 557, the court pointed to a major distinction between Government seizure under the Smith-Connally Act and Government control of the railroads under the Federal Control Act of 1918:

> ". . . Managing officials were 'required to sever their relations with the particular companies and to become exclusive representatives of the United States Railroad Administration.' . . . The railway employees were under its direction, and were in no way controlled by their former employers."

not be subjected to tax by a State or municipality. *M'Culloch* v. *Maryland*, 4 Wheat. (U. S.) 316.

Section 24 also provides in part:

> *"The mining companies are deemed to remain subject to suit as heretofore."* (Italics supplied.) (R. 234.)

Here again, it is basic to the concept of sovereignty that a sovereign cannot be sued except with its own consent. See, for example, the Eleventh Amendment to the Constitution of the United States.

F. This Case Involves and Grows Out of a "Labor Dispute" Within the Meaning of the Norris-La Guardia Act.

That this case involves a "controversy concerning terms or conditions of employment" (Sec. 13(c)) cannot be denied. In his letter of October 21st (R. 408-409) Mr. Lewis stated to Secretary Krug that the Government had misinterpreted the agreement respecting "pro-rata vacation payments" and the manner in which "railroad weights rather than tipple weights" were being used "to compute the payments due the welfare and retirement fund." In addition, he requested a conference "for the purpose of negotiating new arrangements affecting wages, hours, rules . . . and all other pertinent matters . . ." all of which are clearly within the meaning of the statutory phrase "terms or conditions of employment."

Secretary Krug, in his letter of November 14th, 1946 (R. 30), among other things stated the following: "I am obliged to inform you that certain of your *proposals* are of such a fundamental nature that they should be directed to the owners and private operators of the bituminous coal mines . . ." (Italics supplied). That those "proposals" referred to wages and working conditions is made abundantly

clear in subsequent portions of the letter. Thus, Secretary Krug goes on to say:

> ". . . I am convinced that any substantial change in *wage rates and hours of employment* made by the government . . . would postpone . . . the return of the mines to their owners, and would thwart the . . . wishes of all persons concerned for genuine *collective bargaining* between management and labor in the bituminous coal industry.
>
> "I express no views whatever upon the intrinsic merits of any of your *proposals* . . .
>
> "I have frequently urged that you meet with representatives of the coal operators in order to *negotiate, through the normal processes of collective bargaining, a new contract* for the coal industry . . . During the first of these months the situation would be held in status quo, without retroactive *wage changes* . . . if no *agreement* should be reached during this first month, . . . any changes thereafter agreed upon as to *wages and hours* would be made retroactive to December 16th, 1946." (Italics supplied.)

Thus, the immediate cause of the notice to terminate the Krug-Lewis agreement was the failure on the part of the Coal Administrator to accede to the Union's request to negotiate changes in the terms and conditions of employment. There cannot, we repeat, be any question but that the definition of "labor dispute" as set forth in Section 13-C of the act was fully met by the undisputed facts in this case.[23]

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[23] See, also, recross-examination of Captain Collisson (R. 270, 271) wherein he admitted the existence of an unresolved dispute over the manner of weighing coal in computing payments due the Health and Welfare Fund; and cross-examination of Krug (R. 305) showing that on November 11, 1946, he met with the *"Mine Workers Negotiating Committee"* and discussed "questions involving hours, wages, working conditions and . . . the Health and Welfare Fund."

But we may go even beyond that. The Norris-La Guardia Act does not apply only to cases involving actual labor disputes but also to cases which *"grow out"* of a labor dispute. See *Lee Way Motor Freight* v. *Keystone Freight Lines*, 126 F. (2d) 931. Any possible argument that the instant case does not grow out of a labor dispute must necessarily be whimsical in the extreme for the very presence of the Executive Department of the Government in this cause is necessarily premised on its alleged authority under a statute officially designated as the "War *Labor Disputes* Act".[24] (Act of June 25, 1943, 57 Stat. 163, 50 U. S. C. App. Secs. 1501 et seq.) Had there been no "labor dispute" there would not have been and could not have been any Krug-Lewis agreement and no notice to terminate that agreement.

Moreover, the labor dispute between the private mine operators and the Union which was the occasion for the Government seizure of the mines on May 21st, 1946, *has never been resolved* (R. 238, 239, 240). The statements made by Secretary Krug in his letter of November 14th (R. 30, 31) were premised on the clear recognition of the fact that the labor dispute over wages, hours and working conditions which existed between the private mine owners and the Union as of the date of Governmental seizure on May 21st was outstanding up to and beyond the date of the issuance of the temporary restraining order.

It is clear, then, that the definition of the phrase "a case shall be held to involve or grow out of a labor dispute," as set forth in Section 13 (a)[25] of the Norris-La Guardia Act, has been fully met by the facts of this case.

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[24] Sec. 2(d) of the act provides that the term "'labor dispute' shall have the same meaning as in Section 2 of the National Labor Relations Act." Section 2 of the National Labor Relations Act defines "labor dispute" in virtually the same manner as it is defined in Sec. 13(e) of the Norris-La Guardia Act.

[25] Section 13 (a) provides:

"A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry,

We have shown that this case "involves persons who are engaged in the same industry" namely, the private mine operators and the Union. In so showing we have necessarily shown the alternative requisite of involving persons who have "indirect interests" in that industry.

Section 13 (b) defines the phrase "persons participating or interested in a labor dispute," as employed in Section 13 (a).[26]

Clearly, all defendants in this cause come within that definition. "Relief is sought against" them, and they are all "engaged in" or have a "direct or indirect interest" "in the same industry, • • • in which such dispute occurs."

Upon the undisputed facts in the record and the unequivocal language of the Act, this case does involve a labor dispute and does grow out of a labor dispute, and the Norris-La Guardia Act applies. *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552; *United States* v. *American Federation of Musicians*, 318 U. S. 741; *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91; *Lauf* v. *Shinner*, 303 U. S. 323; *Green* v. *Oberg-*

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trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as hereinafter defined) of 'persons participating or interested' therein (as hereinafter defined)."

[26] "A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation."

fell, 121 F. (2d) 46; *United States* v. *Weirton Steel Co.*, 7 Fed. Supp. 255.

The Government having erroneously proceeded on the theory that the Norris-La Guardia Act did not apply, there has been a complete failure to comply with its provisions. To give but a few examples: The *ex parte* order was for a period of ten days whereas under the act such an order "becomes void at the expiration of . . . five days" (Sec. 7 (e)); defendants were prohibited from giving publicity to the existence of and the facts involved in the labor dispute (Sec. 4 (e)), and from advising, urging or otherwise inducing a cessation of work (Sec. 4 (i)). Also there was no "testimony under oath" (Sec. 7) and no "findings of fact" made (Sec. 2) prior to the issuance of the temporary restraining order, and there was no finding and no basis for finding that "complainant has no adequate remedy at law" (Sec. 7).

Possibly the government will argue that the Norris-La Guardia Act does not apply to the instant case because defendants had engaged in unlawful conduct, namely—violation of the War Labor Disputes Act and breach of contract. Even if it were true that such crime and breach of contract had been perpetrated, which we deny, there is no merit to that possible argument. We have already shown the plain intent of Congress to limit the Government to criminal prosecution for violations of the War Labor Disputes Act. Moreover, the decisions holding that criminal, or otherwise unlawful acts on the part of defendants, do not bar the application of the Norris-La Guardia Act, are both numerous and explicit.

In *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91, it was expressly held that "the jurisdictional prerequisites of the Norris-La Guardia Act"

must "be complied with before injunctive processes can be used against the labor union accused of violating the Sherman Anti-Trust Act."

In *Brotherhood of Railway Trainmen* v. *Toledo, Peoria and Western Railroad*, 321 U. S. 50, it was held that violence or threats of violence could not be enjoined without full compliance with the procedural requirements of the Norris-La Guardia Act. See also *Wilson* v. *Birl*, 105 F. (2d) 948; *Lee Way Motor Freight, Inc., et al.*, v. *Keystone Freight Lines, Inc.*, 126 F. (2d) 931; *Southeast Motor Lines, Inc.* v. *Hoover Motor Freight Lines, Inc.*, 34 F. Supp. 390.

The Norris-La Guardia Act "is the culmination of a bitter political, social and economic controversy extending over half a century." (*Milk Wagon Drivers Union* v. *Lake Valley Farm Products, supra.*) That controversy, epitomized by the slogan "government by injunction," was initiated by the injunction obtained by the Attorney General of the United States in the Pullman strike of 1894.[27] The public reaction to that injunction was intense and immediate.[28] The "storms of protest," in which many "thoughtful lawyers joined," were primarily addressed to the perversion of an equitable remedy in a manner that "endangered the personal liberty of wage earners."[29]

The clamor for reform quickly assumed significant political proportions. In 1896, two years after the *Debs* injunction was obtained and one year after the Supreme

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[27] In Re *Debs, supra.*

[28] Lindsey, *The Pullman Strike*, (University of Chicago Press, 1912); 2 Warren, *The Supreme Court of the United States History* (1926), 702-5; Patterson, *Judicial Usurpation of Power* (1905), 10 Va. L. Reg. 855.

[29] Mr. Justice Brandeis in *Truax* v. *Corrigan*, 257 U. S. 312, 366.

Court affirmed it, the Democratic Party denounced labor injunctions as a "highly dangerous form of oppression."[30] Beginning with 1908 the Republican Party, too, advocated the elimination of the abuses inherent in labor injunctions.[31]

Presidents Theodore Roosevelt and Taft, in formal, official statements, strongly criticized the labor injunction and urged reforms upon Congress.[32] A veritable flood of legislative proposals was introduced and discussed in Congress. "These legislative proposals occupied the attention of Congress during every session but one in the twenty years between 1894 and 1914."[33]

At long last, in 1914, Congress enacted the Clayton Act which was described by President Wilson as "a veritable emancipation" of the workingmen of America,[34] and was hailed by Samuel Gompers as "the industrial magna charta upon which the working people will rear their construction of industrial freedom."[35] But the hopes thus engendered proved wholly illusory. They were completely frustrated by "the interpretation placed by the courts" on the Clayton Act.[36]

Inevitably, the failure of the Clayton Act to accomplish its plain purposes renewed, with even greater force, the agitation against equity intervention in labor disputes. Beginning with the 66th Congress, numerous bills seeking to offset the crippling effects of the decisions of the Supreme Court were introduced.[37] These eventuated in

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[30] Proceedings of the Democratic National Convention (1896) 194.

[31] Proceedings of the 14th Republican National Convention (1908) 168.

[32] 15 Messages and Papers of the Presidents, 6983, 7026-8, 7086; 16 *ibid.* 7910, 7213, 7432, 7378.

[33] Mr. Justice Brandeis, *Truax* v. *Corrigan, supra*, p. 369.

[34] Messages and Papers of Woodrow Wilson (1924) 302-7.

[35] 21 American Federationist (1914) 971.

[36] Senate Report No. 163, 72nd Cong., 1st Sess., p. 8. See also Frankfurter and Greene, *The Labor Injunction*, 165-176.

[37] Frankfurter and Greene, *The Labor Injunction*, *supra*, p. 176, n. 169.

the Norris-La Guardia Act of 1932. Seldom, if ever, has any legislation been the subject of such extensive hearings, study and debate.[38] The result has been a statute virtually without parallel in the skill with which it was drafted, in the clarity of the policy which it embodies and in the manner in which it has fulfilled its objectives.

It is fourteen years since the Norris-La Guardia Act was enacted. To some, with memories that are all too short, "government by injunction" has become merely an historical phrase, with academic significance only. They are woefully wrong. It would, we earnestly submit, be a grievous mistake to restore the injunction as a "weapon in American industrial conflicts. It does not work. It neither mines coal, nor moves trains, nor makes clothing. As an adjustor of industrial conflict the injunction has been an utter failure. It has been used as a short cut—but it has not cut anything, except to cut off labor from confidence in the rule of law and of the courts as its impartial organs. No disinterested student of American industry, or of American law, can have the slightest doubt that, beginning with the *Debs* case, the use of labor injunctions has, predominantly been a cumulative influence for discord in our national life."[39]

II

The Restraining Orders Were Void Because They Contravened the Constitution of the United States.

A. The Restraints Imposed.

Although the court below observed that "all the restraining order was, as a practical matter, was an order on Mr. Lewis . . . to order these men not to cease work

[38] Frankfurter and Greene, *Congressional Power Over the Labor Injunction* (1931), 31 Columbia Law Rev. 385-388.
[39] Frankfurter, *Law and Politics, supra*, p. 220.

until the merits of the controversy could be determined,"[40] actually, the order by its terms imposed *six separate* restraints on "the defendants and each of them and their agents, servants, employees, and attorneys, *and all persons* in active concert or participation with them." (Emphasis supplied.)

All those persons were restrained

(1) "from permitting to continue in effect the notice heretofore given by the defendant, John L. Lewis, to the Secretary of Interior dated November 15, 1946."

(2) "from issuing or otherwise giving publicity to any notice that was to the effect that the Krug-Lewis agreement has been, is, or will at some future date be terminated, or that said agreement is or shall at some future date be nugatory or void at any time during the Government's possession of the bituminous coal mines."

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[40] (R. 172-173). The full statement of the court was:

"All the restraining order was, as a practical matter, was an order on Mr. Lewis, which is not by indirection, to order these men not to cease work until the merits of the controversy could be determined, and of course the court respects counsel and respects what you have to say; but, essentially, that is all the court's order meant; and we think Mr. Lewis knew it; that is I think he knew it—I suppose he knew it."

Similarly, on page 178 of the Record appears the following coloquy between the court and counsel for defendants below:

"The Court: . . . and the Court's order was that the notice should be rescinded, or what amounted to the notice should be rescinded, so that the matter could remain in status quo until there should be a judicial determination as to whether or not the contract existed. Now, that is all there is in the case insofar as the restraining order is concerned.

"Mr. Padway: Well, if that is all there is in the case I can assume for the moment that what the miners did with respect to quitting work was lawful and proper.

"The Court: Well, *the miners are not in this case*, sir. (Emphasis supplied.)

"Mr. Padway: They are by the injunctive decree.

"The Court: The Court does not agree with you."

(3) "from breaching any of their obligations under said Krug-Lewis agreement;"

(4) "from coercing, instigating, inducing or encouraging the mine workers at the bituminous coal mines in the Government's possession, or any of them, or any person, to interfere by strike, slow down, walkout, cessation of work, or otherwise, with the operation of said mines by continuing in effect the aforesaid notice or by issuing any notice of termination of agreement or through *any other means or device.*" (Emphasis supplied.)

(5) "from interfering with or obstructing the exercise by the Secretary of the Interior of his functions under Executive Order 9728."

(6) "and from taking any action which would interfere with this court's jurisdiction or which would impair, obstruct or render fruitless the determination of this case by the court."

It will at once be seen that the order itself is far more extensive in coverage both as to persons affected and restraints imposed than the court repeatedly indicated. For the purpose of the argument to which we now address ourselves, namely, the unconstitutionality of the restraints imposed, it is sufficient to limit our discussion to restraints Nos. 2 and 4. As to those, we urge that they are repugnant to the First and Thirteenth Amendments to the Constitution of the United States.

B. The First Amendment.

There can be little doubt but that the second restraint prohibiting various persons described in the order from "*giving publicity* to any notice" respecting the termination of the Krug-Lewis agreement during Government occupancy of the coal mines effectively deprives those persons of freedom of speech and freedom of press.

It must be constantly borne in mind that there has as yet been no declaration or judgment by any competent tribunal

respecting the duration of the Krug-Lewis agreement. Accordingly, it is a fact that when and if some competent court does construe the agreement it may well determine that the interpretation placed on the duration clause by defendant John L. Lewis was entirely correct. In the face of that fact, the prohibition against giving any publicity—carrying with it as it does the coercive threat of punishment—constitutes a prior restraint against public discussion of a matter of profound public interest in the most obvious manner conceivable.[41]

For example, if the United Mine Workers of America should have desired to publish in their official journal a complete statement as to the reasons why counsel for the organization had advised that the Krug-Lewis agreement was terminable as of November 20th, together with a statement as to why Mr. Lewis relied upon counsel's opinion it would have been prevented under threat of criminal punishment from doing so. Again, Mr. Lewis or any other official of the Union or any other person designated by or cooperating with the Union was, by this restraint, effectively prevented from broadcasting over the radio his views and reasons respecting the termination of the Krug-Lewis agreement. Whatever the medium, effective publicity and discussion were completely prohibited.[42]

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[41] ". . . Some injunctions have prohibited the strikers from giving any publicity to the existence of the strike or their reasons for it or their justification of it. Such prohibitions are, of course, outrageous violations of the right of 'free speech'." 75 Cong. Rec. 5463. See also concurring opinion of Mr. Justice Stone in the *Hutcheson* case, *supra*, (p. 237): "The publication, unaccompanied by violence, of a notice that an employer is unfair to organized labor . . . is an exercise of free speech guaranteed by the First Amendment which cannot be made unlawful by an act of Congress."

[42] Compare *Carpenters and Joiners Union* v. *Ritters' Cafe*, 315 U. S. 722, 728, where the Court said:

"Restriction of picketing to the area of the industry within which a labor dispute arises *leaves open to the disputants other traditional modes of communication.*" (Emphasis supplied.)

If the procedures under the Declaratory Judgment Act can thus be used, if, that is, the jurisdiction of a court can be invoked to decide a disputed point of law and pending such decision one party to the dispute whose legal contentions have not as yet been rejected can be foreclosed from exercising basic constitutional rights in order to preserve and secure his interests and rights, then Congress has, by enacting the Declaratory Judgment Act, contrived a device which effectively nullifies constitutional protections.

What has been said respecting restraint No. 2 is equally applicable to restraint No. 4. Indeed, restraint No. 4 goes even further in that it is not limited to speech or publicity respecting the notice of termination of any agreement but prohibits "the inducing" or the "encouraging" of "mine workers" or "any person" by "*any other means or device*" to interfere with the operation of Government-possessed mines. Thus, no member of the United Mine Workers of America or no person acting in concert with that organization would, under this restraint, be permitted to address a union meeting and persuade the members by speech or otherwise peacefully to cease work, no matter what the occasion for his approach to those members might be. If, for example, the private owners, who still remain in effective managerial control of the mines during so-called Government possession, should engage in an arbitrary and provocative course of action and if repeated but futile attempts at remedy were made by the Union, nevertheless, under this restraint, no official or member of the Union and no person acting in concert with them could persuade the mine workers peacefully to quit in protest against that offensive course of action.

"The First Amendment assures the broadest tolerable exercise of free speech, free press, and free assembly, not merely for religious purposes, but for political, economic,

scientific, news or informational ends as well." (Mr. Justice Jackson in *Douglas* v. *Jeannette*, 319 U. S. 157, 179.)

The range of activities proscribed by the temporary restraining order of November 18th "whether characterized as picketing or loitering or otherwise, embraces nearly every practical, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute." (Mr. Justice Murphy in *Thornhill* v. *Alabama*, 310 U. S. 88, 104.)

"In sum, whatever the means used to publicize the facts of a labor dispute, whether by printed sign, by pamphlet, by word of mouth or otherwise, all such activity without exception is within the inclusive prohibition of" that restraining order (*Ibid.* 101).

In *Carlson* v. *California*, 310 U. S. 106, this Court held "For the reasons set forth in our opinion in *Thornhill* v. *Alabama, supra*, publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgement by a state." The same principle applies, of Course, to court decrees. *American Federation of Labor* v. *Swing*, 312, U. S. 321.

See also, *Journeymen Tailors* v. *Millers, Inc.*, 61 S. C. 732; *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293; *Hague* v. *C. I .O.*, 307 U. S. 496; *Patterson* v. *Colorado*, 205 U. S. 454; *Schneider* v. *State*, 308 U. S. 147, 161; *People* v. *Harris*, 104 Colo. 386; *State* v. *Butterworth*, 104 N. J. L. 549, 142 Atl. 57.

The court below brushed aside the extensive arguments presented to it respecting freedom of speech with the simple assertion that "The Court does not think that the con-

tention that freedom of speech has been violated is a matter for serious consideration" (R. 204).

In the course of orally presenting the constitutional arguments the court below intimated that it would not have punished any of the individual miners or other persons for any alleged contempt of the order other than John L. Lewis and, in its opinion, declared that all matters in the restraining order other than the direction to rescind the notice of termination were "simply ancillary" (R. 204).

But the court's *post scriptum* commentary and characterization do not, of course, alter the plain significance and impact of the restraining order. No person covered by that order could be expected to divine what the court said it had in mind. If the order meant what it said—and that, of course, is the only conceivable legal test—then, even had Mr. Lewis cancelled the notice of termination, no member of the Union could thereafter, under the order, encourage a strike during Government occupation for objectives entirely unrelated to the termination of the Krug-Lewis agreement.

Nor does the court's indication that it would not have held any of the miners in contempt for doing any of the things the restraining order explicitly prohibited them from doing save the constitutionality of the Court's restraining orders.

> ". . . The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the *pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.*" *Thornhill's* case, *supra*, 97. (Emphasis supplied.)

See, also, *Near* v. *Minnesota*, 283 U. S. 697, 713.

C. The Thirteenth Amendment.

In paragraph 29 of its complaint the Government alleged that the "notice given by the defendant Lewis, purporting to terminate the Krug-Lewis agreement, constitutes in substance and effect a call for a strike of the bituminous coal mine workers" (R. 6, 7), and, in paragraph 31 (R. 7) it was alleged that "The threatened concerted work stoppage . . . would constitute an irreparable injury to the interests of the people of the United States of America." The court below so found (R. 93, 97).

Despite these allegations and findings the court below repeatedly asserted that the right to quit work was not affected by its restraining order.[43] Here again, where there is a patent contradiction between the plain meaning of the

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[43] On page 169 of the Record appears the following colloquy:

"Mr. Padway: Then again we have here this situation—I think it was fundamental in our jurisprudence . . . that men have the right to work or not to work as they see fit.

"The Court: Well, do you think it is necessary to argue that, Mr. Padway?"

On page 173 of the record appears the following:

"Mr. Padway: Now, if the Court please, and really—and whatever I do say, whatever I say is—and I cannot help putting it bluntly—Your Honor's order tells these men that they cannot strike—period. And, tells them that if they go on strike, in the light of that order, that they will subject themselves to punishment.

"The Court: The Court didn't so understand the order."

On pages 177 and 178 of the record appears the following:

"The Court (interposing): There was no order, either directly or indirectly, and nobody could construe anything the Court has said as an order to the individual miner that he could not work or could work.

"Mr. Padway: Let us go a little further, to the group of miners, that they could work or not work——

"The Court (interposing): There wasn't any order to them that they could not quit —."

language of the formal restraining order issued by the court and the meaning that the court said it had in mind, the former and not the latter is controlling.

To assert that the right to quit work was not involved in this case is not only to engage in inane verbalisms but is, also, completely to confound the only conceivable justification for seeking and obtaining equity relief. It is beyond imagination that these proceedings would ever have been instituted unless a cessation of work in the bituminous coal mines was threatened or took place, and the only possible purpose of the restraining order issued by the court below was to avoid that cessation of work. Put otherwise, the temporary restraining order of November the 18th sought, under threat of severe punishment, to compel persons to work against their will. And that, we submit, is "involuntary servitude" within the meaning of the Thirteenth Amendment to the Constitution of the United States, whose "plain intention was . . . to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude". (Mr. Justice Hughes in *Bailey* v. *Alabama*, 219 U. S. 241.)

Even if we assume, arguendo, that a refusal to work is for a purpose declared to be unlawful, it is beyond the power of any court in this country to compel any person or group of persons against his or their will to work for the private profit of another person or group of persons. Let us make the most extreme assumption possible—one wholly unjustified by the facts—namely, that by the Krug-Lewis agreement all the coal miners individually obligated themselves to remain at work during Government occupation of the mines and that they had breached that agreement. Even then, no court of equity—regardless of the existence or applicability of anti injunction acts—would have the

right to compel them to remain at work. In unusual situations involving exclusive agreements for unique personal services equity courts can restrain persons from performing those services for others. That is the outermost limit of their powers. They cannot compel them specifically to perform the work they contracted to do. That inherent limitation on equity courts is fortified and is placed beyond the reach of Congress by the express inhibitions of the Thirteenth Amendment.

> "We are not advised of any rule of law under which any man in this country will be forced to serve with his labor any other man whom he does not wish to serve." *Henderson* v. *Coleman*, 7 So. (2d) 117 (Fla.).

See, also, *Stapleton* v. *Mitchell*, 60 Fed. Supp. 51; *U. S.* v. *Petrillo* (decided November 25, 1946, U. S. D. C. N. D. Ill. E. D.); *Carpenters Union* v. *Citizens Committee*, 333 Ill. 225, 164 N. E. 393; *Alabama State Federation of Labor* v. *McAdory*, 246 Ala. 1.

Doubtless counsel for the Government will say, as did the court below, that the restraining order merely directed the defendant John L. Lewis to rescind his notice of termination and that it was not addressed to the right of the miners themselves to quit work. As already shown, such a contention overlooks the hard and crucial fact that, standing alone, Mr. Lewis' notice means nothing; it could cause no damage, irreparable or otherwise, and affect no interests, private or public. The miners' cessation of work —and that alone—had economic and legal significance. Accordingly the restraining order was necessarily and exclusiveiy addressed to that cessation of work.

In any case, the restraining order on its face directly prohibits the miners, individually and collectively, from engaging in a peaceful cessation of work. "All persons participating with the defendants are restrained from

"instigating, inducing, or encouraging the mine workers . . . to interfere by . . . cessation of work . . . with the operation of mines by . . . and . . . means or device." The illustrations given in our discussion of the First Amendment apply equally here. Thus, any miner or group of miners who quit their work in protest against some condition in the mines that they find intolerable will, by such quitting, be instigating or inducing or encouraging other mine workers to cease work and thereby violate the restraining order.

When argument was addressed to the court below showing the "omnibus" nature of the restraining order the court replied that the restraints imposed were the same things as were "prohibited in the Smith-Connally Act." (R. 125). Possibly the court's observation was intended to justify the inordinate scope of its restraining order by reliance on the fact that Congress had employed similar language,[44] but that would overlook the obvious fact that Congress is subject to the same constitutional limitations as are the courts. Moreover, Congress was careful to note an exception in these words:

> "No individual shall be deemed to have violated the provisions of this section by reason only of his having ceased to work or having refused to continue to work or to accept employment,"

an exception conspicuously absent from the restraining order. Under the restraining order even a single individual's cessation of work that was successfully calculated to induce or encourage others to quit work would be subject to contempt proceedings.

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[44] While the language of the restraining order is in many respects similar to the language contained in Section 6 of the War Labor Disputes Act, a comparison of the two will show how much more extensive and all inclusive is the temporary restraining order involved in this case.

If, as we have shown, the restraints imposed by the court deprive persons of rights under the First Amendment or under the Thirteenth Amendment or both, then the restraining orders were entirely without vitality and could be disregarded with complete impunity under the authorities that we now discuss.

III

The Restraining Orders Being Void by Reason of Conflict With the Norris-La Guardia Act and Conflict With the Constitution, They Could be Disregarded With Impunity or, if They Could Not Be Disregarded a Trial by Jury Was Mandatory.

A. Void Orders Are Nullities.

We invoke and rely upon the familiar principle that a restraining order issued by a court having no jurisdiction under the applicable statutes or the Constitution is void *ab initio* and, therefore, "no contempt proceeding" can "be maintained for any disobedience of its provisions." *Gompers* v. *Buck Stove & Range Company*, 221 U. S. 418, 436. The exercise of jurisdiction to punish for Contempt of a void order compounds the usurpation of jurisdiction.

In the case of *Ex Parte Rowland*, 104 U. S. 604, this Court said:

> "... But if the command was in whole or in part beyond the power of the court, the writ, or so much as was in excess of jurisdiction was void, and the court had no right in law to punish for any contempt of its unauthorized requirements. Such is the settled rule of decision in this court."

Similarly, in *Ex Parte Fisk*, 113 U. S. 713, it was held:

> "When, however, a court of the United States undertakes, by its process of contempt, to punish a man

> for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for contempt is void."

See, also, *In Re Ayers*, 123 U. S. 443, and *In Re Sawyer*, 124 U. S. 200.

In the *Gompers* case, *supra*, (p. 436) the Court explicitly recognized that if the injunction there affected constitutional freedoms "it would be unnecessary to go further into an examination of the case or to determine whether the defendants had in fact disobeyed the prohibition contained in the injunction." See also *Thomas* v. *Collins*, 323 U. S. 516; *Fortenbury* v. *Superior Court of California*, 100 Cal. Dec. 407, and *In re Holle, et al.*, 145 N. Y. S. 388, 160 App. Div. 369.

The rule that orders which are either unconstitutional or beyond the jurisdiction of the issuing court cannot sustain contempt proceedings is peculiarly applicable to the instant case for two reasons. First, because as we shall soon more fully show, the Norris-La Guardia Act would lose all meaning and significance if orders issued contrary to its terms could be enforced by criminal contempt.

Second, the court below was expressly proceeding (R. 204) under Section 385 of the United States Code which limits the power of courts to impose punishment for disobedience only of *"lawful"* orders.[45] Under the common

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[45] "The . . . courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

law it was no defense for a contemner to allege and prove that the order was unlawful. The only available defenses were the lack of jurisdiction of the court or the fact of compliance with the order. Accordingly, read literally, Section 385 imposes a greater limitation on the power of courts to punish for contempt than existed under the common law rule. However that may be, whatever meaning can possibly be assigned to the phrase "lawful order", it must include orders which the punishing court has jurisdiction to issue and orders which conform with the Constitution.

The Government contends that defendants could be held guilty of contempt even if the Norris-La Guardia Act applies (R. 76) and relies for its contention upon two cases, *U. S. v. Shipp*, 203 U. S. 563, and *Carter* v. *U. S.*, 135 F. (2d) 858.

The *Shipp* case is readily distinguishable on the ground that neither the Constitution nor any statute deprived the Supreme Court of jurisdiction to issue the order there involved; whereas here we are dealing with a temporary restraining order that both contravenes the Constitution and is, under an act of Congress specifically designed toward that end, beyond the jurisdiction of the court. The full significance of that distinction cannot be overemphasized because it involves the very quintessence of the Norris-La Guardia Act and shows the extremity of the error in the *Carter* decision which upheld a judgment for contempt of an order issued in violation of the Norris-La Guardia Act.

Among the basic reasons why Congress eliminated the injunctive process from labor disputes is that in ordinary situations the only reason and justification for temporary restraining orders is to maintain the *status quo*, whereas in labor cases courts "cannot preserve the so-called *status*

quo; the situation does not remain in equilibrium awaiting judgment upon full knowledge."[46]

It was recognized that through injunctions, and particularly through *ex parte* restraining orders, the courts had acted in a manner that was completely and unfairly disadvantageous to the unions and their members engaged in labor disputes; "that in the arena of industrial controversies . . . the forms of equity give rise to inequity;"[47] that in innumerable instances the mere issuance of a restraining order in and of itself was sufficient to break strikes, and this even before the union had the slightest opportunity for its day in court to show the legality and

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[46] Frankfurter and Greene, *The Labor Injunction*, p. 201. See also, Sec. 103.55 of the Wisconsin Labor Code (Anti-Injunction Act), Wis. Statutes of 1941, which provides:

"PUBLIC POLICY AS TO LABOR LITIGATION. In the interpretation and application of sections 103.56 to 103.59, the public policy of this state is declared to be:

"Equity procedure that permits a complaining party to obtain sweeping injunctive relief that is not preceded by or conditioned upon notice to and hearing of the responding party or parties, or that issues after hearing based upon written affidavits alone and not wholly or in part upon examination, confrontation and cross-examination of witnesses in open court, *is peculiarly subject to abuse in labor litigation for the reasons that*

"(1) *The status quo cannot be maintained but is necessarily altered by the injunction;*

"(2) Determination of issues of veracity and of probability of fact from affidavits of the opposing parties that are contradictory and, under the circumstances, untrustworthy rather than from oral examination in open court is subject to grave error;

"(3) Error in issuing the injunctive relief is usually irreparable to the opposing party; and

"(4) Delay incident to the normal course of appellate practice frequently makes ultimate correction of error in law or in fact unavailing in the particular case." (Emphasis supplied.)

See also, 47 Yale Law Journal 1136.

[47] From Frankfurter and Greene, *Congressional Power Over the Labor Injunction*, 31 Columbia Law Review 385, 386.

propriety of its action. "The restraining order and the preliminary injunction invoked in labor disputes reveal the most crucial points of legal maladjustment. Temporary injunctive relief without notice, or, if upon notice, relying upon dubious affidavits, serves the important function of staying defendant's conduct regardless of the ultimate justification of such restraint. The temporary proceedings, in other words, make the issue of final relief a practical nullity."[48]

Experience had shown that a large number of restraining orders never reached the point of preliminary injunctions, that a large number of preliminary injunctions never matured into permanent injunctions, and that a surprisingly large number of permanent injunctions were never the subject of appeal.[49] The reason for this is quite obvious. By the restraining order the union was robbed of the chance of exercising the only power it had in a labor dispute. It was robbed of the chance of availing itself of the lawful, economic weapons of the strike, the picket and the like. It can be said axiomatically that in many instances a strike temporarily delayed will be, because of that delay, completely defeated.[50]

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[48] Frankfurter and Greene, *The Labor Injunction*, p. 200.

[49] See S. Rep. 1060, 71st Cong. 2d Sess., part 2, p. 7:

"A large majority of injunction proceedings are never carried beyond a restraining order or temporary injunction and, therefore, are unlikely ever to reach the state of official reporting which is concerned largely with final decrees and with decisions of appellate courts."

[50] "Moreover, the suspension of strike activities, even temporarily, may defeat the strike for all practical purposes and foredoom its resumption, even if the injunction is later lifted." (*Ibid.* p. 201.)

See also, S. Rep. 1060, *supra*, p. 20:

"Injunctions are often applied for and issued for the moral effect that such injunctions will have in disheartening and discouraging employees engaged in a strike, rather than because of any real necessity to protect property."

Congress, carefully and realistically examining and analyzing all of these factors, reached the accurate and inescapable conclusion that the courts in justifying such restraining orders as maintaining the *status quo* were engaging in the purest kind of fancy. Congress realized that this was not a maintenance of the *status quo* but a complete abandonment of the *status quo.* Congress, we repeat, realized that the dynamism of a labor dispute was not, under true principles of equity, the proper subject of equity jurisdiction. The result was the Norris-La Guardia Act which curtailed the equity jurisdiction of Federal courts and took every precaution conceivable against evading its mandate.

The widespread adoption of the rule announced in the *Carter* case would completely emasculate the Norris-La Guardia Act. It is fair to say on the basis of the legislative history of the Norris-La Guardia Act that many Federal courts would seize upon this rule to frustrate the will of Congress. They would again resort to *ex parte* orders and enforce them vigorously, always asserting that under the *Carter* rule they had jurisdiction to determine their own jurisdiction and to maintain the *status quo* pending that determination. In this they would be avidly aided by plaintiffs in labor cases who would readily, in their pleadings, resort to every possible device in order to obscure the fact of a labor dispute being involved. This Court could not accept, even in a proceeding limited to criminal contempt, the principle of the *Carter* case without absolute certainty that the efficacy of the Norris-La Guardia Act would be thereby automatically and completely terminated.

The fiction of *status quo* is readily seen in the instant case. The Government asked the court below to maintain the *status quo* until it could render its declaratory judgment. In asking for a declaratory judgment of the rights

and duties created by the Krug-Lewis agreement the Government was obliged to and did allege that there is a controversy and dispute over the meaning of that agreement, particularly over the meaning of its duration clause. The Government claims that the Krug-Lewis agreement by its terms remains in force for the period of Government possession. And, as the Government correctly alleges, Mr. Lewis claims that the contract may be reopened in the manner done and that the agreement was effectively terminated as of midnight, November 20, 1946. There being this good faith difference of opinion respecting the meaning of the contract, the Government requested the court below to resolve the difference by way of declaratory judgment. So far, so good. But, see what happens where the Government also obtained "ancillary" relief in the form of a compulsive restraining order. Plainly, that relief was not ancillary, it did not maintain the *status quo*. That relief, granted *ex parte*, resolved the basic issue of the primary proceeding without even giving one of the parties to the contract an opportunity to present its views and argument and subjected that party to criminal process and inordinate fine. The restraining order by its terms had the direct effect of preventing the defendants from exercising their rights under that contract as they viewed them. To this day there has been no hearing on the issues in the primary case. 'If, in the indeterminable future the court below shall render a declaratory judgment sustaining Mr. Lewis' views on his rights under the Krug-Lewis agreement, and no one can gainsay at this stage of the proceedings that the court might so decide, then the defendants would have won a pyrrhic victory. It would be of little satisfaction and of no value to defendants, if, say, in May of 1947, it is decided that the Union did have the contractual right to terminate the agreement at mid-

night on November 20th where, as here, during all that time defendants were effectively and coercively restrained from exercising that right. Indeed, under the *Carter* rule and the decision of the court below the United Mine Workers could easily be bankrupt for doing what it had every lawful right to do.

It was precisely to avoid grotesque situations of this nature that the Norris-La Guardia Act deprived Federal courts of the power to issue temporary orders as well as permanent injunctions in labor disputes.[51] Obviously, the only device whereby a Federal district court can maintain the *status quo* while determining its own jurisdiction in a case of this nature is by the issuance of temporary orders, and the act expressly precludes the temporary order issued in this case.

Even if it could be assumed that the rule announced in the *Carter* case is correct, the judgments of the court below must be reversed for two reasons:

(1) The *Carter* rule is expressly and necessarily limited to criminal contempt proceedings. But, for want of compliance with Rule 42 of the Federal Rules of Criminal Procedure as we shall hereinafter show, there was no such proceeding before the District Court in the case at bar. It was conceded in the *Carter* case that the plaintiff could not have a remedy for violation of an order he had no right to have. So, too, in this case. If this Court should find that the temporary restraining order was contrary to the Norris-La Guardia Act, then the plaintiff is not entitled to remedial

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[51] Independent of the Norris-La Guardia Act the restraining orders and preliminary injunction should not have been granted because, without hearing and in the face of doubtful legal claims, they directed an affirmative act which settled the merits of the case. *Beidenkopf* v. *Ins. Co.*, 160 Iowa 629, 142 N. W. 434; *Trust Co.* v. *Crider*, 102 Fla. 593, 136 So. 434; *Penn. R. Co.* v. *Kelley*, 77 N. J. Eq. 129, 75 A. 758; *Powhatan Coal & Coke Co.* v. *Ritz*, 60 W. Va. 395, 56 S. E. 257.

relief and there could be no civil contempt. The Court below, having found and adjudged the defendants guilty of both civil and criminal contempt and having imposed fines without in any way allocating or apportioning them, the judgments must be reversed.

(2) Once the Court finds that the Norris-La Guardia Act applies, then defendants have a clear statutory right to a trial by jury (Section 111),[52] regardless of whether or not the *Carter* rule is adopted. The court below, having concluded before the trial that the Norris-La Guardia Act did not apply (R. 203), proceeded in disregard of defendants' right of trial by jury.

Under rule 42(b) of the Federal Rules of Criminal Procedure relating to "criminal contempt", "the defendant is entitled to a trial by jury in any case in which an act of Congress so provides." Rule 23(a) of the same Rules, relating to "trial by jury or by the court", provides that

> "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

Accordingly, it was mandatory upon the Court to order a jury trial, and since the defendants herein did not in any way waive a jury trial in writing or otherwise, but affirmatively declined to do so (R. 114), the Court was clearly

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[52] "Sec. 111. Contempts; speedy and public trial; jury.—In all cases arising under Sections 101-115 of this title in which a person shall be charged with contempt in a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: *Provided*, That this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders or process of the court. Mar. 23, 1932, c. 90, Secs. 11, 47 Stat. 72."

without power to enter a judgment of conviction herein without the verdict of a jury.

The scope of Section 11 of the Act is well described in the Report of the Committee on the Judiciary,[53] in which it is said:

> "Section 11: Section 11 provides that in cases in which a person shall be charged with contempt for violating injunctive orders the accused shall enjoy the right to a speedy and public trial by a jury . . . That Congress has authority to provide for such a trial by jury has been upheld by the Supreme Court of the United States in the case of Michaelson *v.* U. S. ex rel. Chicago, St. Paul, Milwaukee & Omaha Railway Co. (266 U. S. 42), wherein the Supreme Court upheld a similar provision contained in section 21 of the Clayton Act."

The tyranny involved in contempt prosecutions received major consideration in the Senate Committee on the Judiciary[54] where it is appropriately said:

> "It is amazing to realize that in the last 40 years there has developed in the American courts the practice of writing a special law to fit the individual case by judges in issuing labor injunctions; and that thereupon the judge, who himself wrote the law, has undertaken to prescribe the penalty for its violation and to punish the violator without permitting the accused to enjoy a trial by jury or even to insist upon a trial before another judge . . .
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> . . . . . .
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> "There can be no question, therefore, that there has been created, as a result of writing law into injunction orders and then enforcing those orders by the same judge who wrote them without a grant of trial by jury, that condition of uniting the two powers of making and

[53] H. R. Rep. 669, 72nd Cong., 1st Sess., p. 10.
[54] S. Rep. 1060, Part 2, 71st Cong., 2d Sess., pp. 16-17.

enforcing laws in one person or one body of men wherein, using the language of Blackstone, 'there can be no public liberty.'

"It is difficult to see how any civilized people could indefinitely submit to such tyrannical procedure. It is not difficult to understand how such cruel laws, made not by any legislature but by a judge upon the bench, should bring our Federal courts into disrepute. Neither is it difficult to see how such injunctions, violating the conscience of civilization, should frighten persons against whom such injunctions are issued into desperation. What free American citizen is willing to submit to the violation of his sacred rights of human liberty and freedom?"

It is apparent from the foregoing that the right of trial by jury guaranteed in Section 11 of the Act is as fundamental as that provided in the Sixth Amendment. It is mandatory for reasons of public policy, and is not to be dispensed with except on the clearest showing of waiver by the defendant in like manner as provided in Rule 23(a), Rules of Criminal Procedure. The court below erroneously announced before trial that the Norris-La Guardia Act did not apply. By this ruling the defendants' right to a jury trial predicated on Section 11 was effectively foreclosed.

IV

Judgment Against the United Mine Workers of America Is Not Warranted Under the Law and the Evidence.

The District Court's judgment that the United Mine Workers of America is guilty of contempt must be tested by the criterion provided in section 6 of the Norris-La Guardia Act (29 U. S. C. A., Sec. 106).[55]

[55] Sec. 6 reads thus:

"No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United

One of the basic purposes of section 6 was to insulate labor unions against responsibility for the unlawful conduct of their members, agents, employees and officers. It contemplated that actual, not theoretical, culpability or complicity could provide a basis for Union responsibility. Repetitive use of the word "actual" in the congressional enactment under consideration undeniably evidences the intent of Congress that Union responsibility for unlawful acts should rest upon factual realities and not juristic imputations.[56] Tested by the requirements of section 6, it is clear that judgment against the defendant United Mine Workers of America is unwarranted because there is neither clear proof of actual participtpion in, nor actual authorization of, unlawful acts, nor ratification of such acts after actual knowledge.

Despite the professions of the court below that the temporary restraining order was not designed as a directive to the 400,000 bituminous coal miners, the terms thereof by specific language, as defendants have elsewhere herein shown, applied to the miners themselves, since the purposeful objective of the restraining order was to assure the continued production of coal. In final analysis achievement

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States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

[56] Use of "actual" in the statutory text of section 6 excludes the idea of imposing responsibility on labor unions under the theory of cases dealing with acts *mala prohibita*, illustrated by *Egan* v. *United States*, 137 F. (2d) 369, wherein the court considered the alleged violation of the Public Utility Holding Company Act (15 USCA § 791(h)), which Act prohibited political contributions by any registered public holding company. See also Burdick, *The Law of Crimes*, § 180.

See also S. Rep. 163, *supra*, which shows that Section 6 "is concerned especially with establishing a rule of evidence" and that "clear proof should be required, so that . . . criminal responsibility *should not be imputed* but proven beyond reasonable doubt in order to impose liability." (Italics supplied.)

thereof could become real only if the miners complied. Imposition of judgment, however, is not upon the miners but upon the United Mine Workers of America, an entity separate and distinct from the miners themselves.[57]

Even prior to the adoption of section 6, there had been judicial rejection of the doctrine of vicarious responsibility against the defendant union.[58] The adoption of section 6 imposed additional requirements, among them that proof of union activity, upon which responsibility might be premised, should be "clear." Assuming, therefore, that there was proof that individual miners actually ceased to produce coal[59] and that such conduct was unlawful because it contemned the order of the court below, it would still be necessary to show by clear proof that the defendant union had actually participated in, authorized or ratified such conduct. In *Coronado Coal Co.* v. *United Mine Workers of America*, 268 U. S. 295, 304, this Court declared that:

> ". . . Certainly it must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done was done by their agents in accordance with their fundamental agreement of association."[60]

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[57] *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344; *Coronado Coal Co.* v. *United Mine Workers of America*, 268 U. S. 295.

[58] Idem. As to criminal responsibility in *U. S.* v. *Local 807 of I. Brotherhood*, 118 F. (2d) 684, 688 (CCA 2), it is said:

> "It is hornbook law that, absent a clear legislative intent, an unincorporated association does not commit crimes, 7 C.J.S., Associations, sec 17, p. 43."

[59] Defendants deny that this fact is established by any competent proof in the record.

[60] Article IX, Sec. 27 of the Union's Constitution reads:

> "The (executive) Board shall have power between Conventions, by a two-thirds vote, to recommend the calling of a strike, but under no circumstance shall it call a strike until approved by a referendum vote of the miners." (R. 522.)

There is nothing in the record showing either a referendum approval of the membership or a strike call by the Board.

Nor does the fact that the defendant union took no affirmative action in disapproval of the miners' conduct warrant the imposition of a fine upon the defendant union. The precise contention, namely that unions must take disciplinary action against offending members in order to escape responsibility, was rejected in the first *Coronado* case, *supra*, p. 395.

There remains only the question of the union's responsibility for the conduct of defendant Lewis. The court below was positive in its statements that the purpose of the restraining order was to direct Lewis to withdraw the termination notice.[61] The essence of the court's finding that Lewis had contemned the order of the court below is found in his failure to withdraw the termination notice.[62] Hence the imposition of fines is based upon that omission. Since the Union, if it is to be regarded as an entity, can act only through its officers and agents, and since the Government complained only of the passive conduct of the defendant Lewis and not of any other officer or agent of the union, it is necessary to ascertain whether the defendant union is responsible for such passive conduct, assuming, of course, that defendant Lewis did contemn the order of November 18, 1946.[63]

It may be stated without fear of contradiction that the evidence adduced in this record does not show by any kind of proof that there was any actual participation or authorization by the defendant union directing Lewis to

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[61] See Record, pp. 172-3, 178.

[62] See Paragraph 34, Findings of Fact, Record, p. 97.

[63] Constitution of the United Mine Workers of America vests the supreme executive and judicial powers of the union in its executive officers and executive board between International Conventions. Art. III, sec. 1 (R., 517). None of the officers of the union, other than John L. Lewis, and none of the members of the executive board is made a party defendant to the instant proceeding, nor is there complaint asserted by the Government against any officer or board member, other than defendant Lewis as president.

contemn the restraining order nor is there any evidence that the defendant union affirmatively ratified the passive conduct of the defendant Lewis so as to bring the defendant union within the purview of the language of section 6. In *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, this Court—even prior to the enactment of the Norris-La Guardia Act—refused to impose liability upon the defendant union because of activities of its national president. This Court there stated (p. 394):

> ". . . It would be going very far to consider such acts of the president alone a ratification by the International Board, creating liability for a past tort. The president had no authority to order or ratify a local strike . . . If the International body had interfered or if it had assumed liability by ratification, different questions would have arisen."

That mere agency of an officer does not suffice to render responsible a labor union for the officer's act, even though such act may be regarded as unlawful, is recognized in *United States* v. *International Fur Workers Union, etc.*, 100 F. (2d) 541, (C. C. A. 2, 1938) (certiorari denied, 306 U. S. 653, wherein the court stated (p. 547)):

> "But an officer of an unincorporated association, no more than an officer of a corporation, is not authorized merely by virtue of his office to make his principal a party to an unlawful conspiracy."

In that case the Circuit Court of Appeals rejected the theory of vicarious liability and held that the District Court had erred because it had "excluded the issue whether the unions had authorized or ratified what their officers did upon their behalf."[64]

In the absence of any, much less the "clear" proof required by section 6, judgment against the defendant

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[64] See also *Cinderella Theater Co.* v. *Sign Writers' Local Union*, 6 F. Supp. 164 (DC, Mich., 1934).

union in any amount is unwarranted and erroneous and must be reversed. And the same conclusion is required under common law principles, even if the Norris-La Guardia Act is found not to apply.

V

The Pleadings and Procedures in This Case Cannot Sustain Judgments in Civil and Criminal Contempt, or Either.

A. The Pleadings

The contempt charges under consideration are grounded in a petition filed by the Attorney General of the United States, the expressed purpose of which was to secure "a rule against the parties above named to show cause why they should not be *punished* as and for a contempt of this Honorable Court and for such further orders in the premises as are just and proper" (Emphasis supplied) (R. 66). The Rule to Show Cause issued on the petition directed defendants to appear to show cause "why they should not be *punished as and for a contempt of this court*" (Emphasis supplied) (R. 73). Thereafter defendants filed their motion to discharge and vacate said rule (R. 82) asserting, *inter alia*, that the proceeding was for criminal contempt. Clearly under the prayer of the Government's petition and under the language of the rule to show cause, the assertions of defendants that what the Government sought in the contempt proceedings was punitive, rather than remedial, in character, were fully justified.

The essence of defendants' contentions on its motion to discharge and vacate the rule to show cause was (1) that the relief sought in the petition for said rule sounded in criminal contempt and the rule to show cause would not support an averment or judgment of civil contempt; (2) being criminal, the contempt proceeding had to be

initiated in the manner of, and pursuant to the requirements of Rule 42(b) of the Federal Rules of Criminal Procedure for the District Courts of the United States; and (3) the Government having failed to comply with said Rule 42(b), there was in fact no proper pleading upon which defendants could be tried for either civil or criminal contempt. The District Court rejected these contentions to the prejudice of the defendants.

B. The Relief Sought in the Petition Sounded in Criminal Contempt

A well established principle in the law of contempt is that where the contempt proceeding is remedial in character, is for the benefit of the complainant and relates to a matter of private interest only, there is involved a civil contempt, whereas if it is to vindicate the authority of the Court and for the public welfare, the contempt is criminal. Dangel, Contempt, p. 5; *Gompers* v. *Buck Stove and Range Company*, 221 U. S. 418; *Merchants Stock & Grain Company* v. *Board of Trade of City of Chicago*, 201 Fed. 20, 23. Thus, "civil" is matched with "remedial" purposes while "criminal" is matched with "punitive" purposes.

Because, in the instant proceeding, the temporary restraining order is based upon public interest, public welfare and safety, defendants assert there is no sanction for the Government to seek a judgment in civil contempt. Nor is this contention dissipated by this Court's language in *McCrone* v. *United States*, 307 U. S. 61, that "the mere presence of the United States as a party acting through its agents, does not impress upon the controversy the elements of a criminal proceeding." The determination that the proceeding in that case was remedial rested in part upon the factor that "Congress has expressly authorized

such a proceeding by an agent of the United States in the Federal courts." In the instant case, not only is there no such congressional authorization but, as we have herein shown, it was the clear design of Congress to deny Government the right to utilize the injunctive process. Accordingly, in the absence of statutory sanction and representing no private interest of its own, the Government has no standing in this case as enables it to maintain proceedings for civil contempt. *Federal Trade Commission* v. *McLean & Son*, 94 F. (2d) 802.

But even assuming the Government may have sought remedial relief here, it did not do so by its petition seeking relief. In *Creekmore* v. *United States*, 237 F. 743, the court stated that "one of the chief functions of a prayer in such informations is to show whether it is sought to convict the defendant of a civil or criminal contempt."[65] The determining factor employed by this Court in the *McCrone* case, *supra*, in appraising that proceeding as remedial was the relief sought in the petition. The Court's opinion, in part, reads (pp. 64, 65):

> ". . . Here, the summons served on petitioner required only that he testify in a tax inquiry properly conducted by an agent of the Bureau of Internal Revenue. *And the agent's petition to the District Court, to which we may look in determining the nature of the proceeding, invoked judicial assistance solely in obtaining petitioner's testimony.* Authority of the Court was sought to *buttress the procedure for collection of taxes* and not in 'vindication of the public justice', as in criminal cases." (Emphasis supplied.)

In the instant case the prayer for relief did not address itself toward any coercive or remedial action on behalf of the complainant but solely "for the purpose of securing

[65] See also Dangel, *Contempt*, p. 5, where it is stated that the "prayer of the petition for relief is determinative of the nature of the proceedings."

a rule against the parties above named to show cause why they should not be punished as and for a contempt of this Honorable Court" (R. 87) or, as appears in the supporting affidavit of Captain N. H. Collisson, Coal Mines Administrator, that "the said defendants have interfered with this Court's jurisdiction" (R. 68). Hence, it may not be gainsaid that the purpose of the contempt proceeding was purely punitive and in vindication of the authority of the District Court and therefore criminal in character.

The conclusion of law by the court below that the defendants were guilty "beyond a reasonable doubt" is one which indicates that the court was using the formula of criminal procedure.[66] Moreover, the judgments themselves negate the characteristic accorded them as both civil and criminal. In the case of defendant Lewis, he "was ordered to pay a fine in the sum of $10,000.00" whereas the Union was "ordered to pay a fine in the sum of $3,500,000." This is not the form of judgment employed in a civil contempt proceeding. *In re Farkas*, 204 Fed. 343, recites that—

> "Where a person is in contempt for failure to perform a duty under the bankrupt law, he should first be allowed to purge himself of the civil contempt by performing the required duty . . ."

See also *Gompers* v. *Buck Stove & Range Co.*, 221 U. S. 418, wherein it is said (p. 442):

> ". . . But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punish-

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[66] *Bessette* v. *Conkey Co.*, 194 U. S. 324, 338; *Schwartz* v. *United States*, 217 Fed. 866; *Oates* v. *United States*, 233 Fed. 201, 206 (CCA 4, 1916); See Frankfurter and Greene, *The Labor Injunction*, pp. 58, 59.

ment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order."

In *Smith* v. *Miller*, 197 N. E. 893 (Ind., 1935) the court rejected a contention that the contempt was civil because, as the court stated, "The judgment makes no provision that the fine be paid to or for the benefit of the plaintiff," and this result obtained despite the fact that evidence "heard by the court upon questions presented, would indicate that the proceedings were for civil contempt."

Nor was there any proof to sustain a judgment in civil contempt. A fine in an amount which is unrelated to the injury asserted by the complainant is punitive and not remedial. *Oakland Coal Co.* v. *Wilson*, 196 Ind. 501, 149 N. E. 54; *Woodworth* v. *Woodworth*, 173 Okla. 554, 48 P. (2d) 1052 (1935). See *Judelshon* v. *Black*, 64 F. (2d) 116 (C. C. A. 2, 1933), where it was held that when defendant's violation has caused plaintiff no injury, there is no ground for a civil contempt proceeding. The Government in the instant proceeding did not prove any monetary damages whatsoever upon which any compensation might be founded. The record shows that the fine of $3,500,000 was premised solely upon the arbitrary recommendation of counsel for the Government that the Union be fined $250,000 a day. Clearly there is no causal relationship between the fine imposed and the alleged acts for which the Government sought contempt action.

Accordingly, defendants' position that the proceeding was for alleged criminal contempt cannot be effectively refuted; and it follows therefrom that the judgments in civil contempt cannot be sustained.

C. The Contempt Proceeding Instituted by the Government Was an Improper One Because it Was Ancillary to the Main Cause and Because it Did Not Comply With Rule 42(b).

As shown, the proceeding instituted could only have been for criminal contempt; and the decisions announcing the principle that, in an action for criminal contempt the proceeding is not a part of the main cause and not ancillary but independent and separate, are numerous and of long duration. *United States ex rel. W. Va.-Pittsburgh Coal Co.* v. *Bittner*, 11 F. (2d) 93 (C. C. A. 4, 1926); *Gompers* v. *Buck Stove and Range Company, supra; Federal Trade Commission* v. *Abe McLean & Son*, 94 F. (2d) 802.

Rule 42(b) of the Federal Rules of Criminal Procedure for the District Court of the United States, effective on March 21, 1946, provides specifically that "A criminal contempt . . . shall be prosecuted on notice. The notice shall state the time and place of hearing. . . . and shall state the essential facts constituting the criminal contempt charged and *describe it as such* . . ." (Emphasis supplied.)

There may not, of course, be any denial that the Government did not prosecute the defendants on any notice, as Rule 42(b) commands, nor did the rule to show cause describe the contempt as criminal in nature. Nor is there compliance with the third requirement, namely, that the notice shall state the essential facts constituting the criminal contempt charged. Even though it might be assumed that the Government's petition may be classed to serve in lieu of notice, it does not "state the essential facts constituting the criminal contempt charged." As the record shows, the charging portion of the Government's petition is premised, not upon any facts known by the Attorney General, not upon facts given to him by another which he

believes to be true, but solely from assertions "on information and belief" of N. H. Collisson (R. 66-68) who does not recite the sources of his information. Instead of facts, the charge is upon hearsay twice removed from the facts they purport to charge. "The exaction of positive allegations to support the rule to show cause is intended to protect the Court from the improvident institution of contempt proceedings and useless investigation as to the breach of their orders which the proof may show were not violated." *In re Rice*, 181 F. 217 (C. C., M. D., Ala., 1910).

There is ample judicial authority that an affidavit upon information and belief is insufficient upon which to base constructive contempt proceedings, and the contemned court acquires no jurisdiction thereunder to issue an attachment for contempt. See *State ex rel. Harvey* v. *Newton*, 112 N. W. 52 (N. D., 1910), citing numerous cases from other jurisdictions.[67]

We recognize that there is some Federal authority which permits the issuance of rules premised upon affidavits of information and belief where such affidavits are those of Federal district attorneys. See *Conley* v. *United States*, 59 F. (2d) 929. See also, *Creekmore* v. *United States*, 237 F. 743, where verification was by a United States district attorney to the effect that the facts stated were true and correct upon information and belief. But, such is not the

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[67] In its opinion (p. 54) the court quoted from *Kaeppler* v. *Bank*, 8 N. D. 411, 79 N. W. 869:

"As the application for the arrest is an ex parte proceeding, and as it is in derogation of personal liberty, the least that can be required is that the application make an undoubted prima facie case. Upon well-settled, general principles this cannot be done, in the absence of statutory sanction, by an affidavit based upon information and belief, for the very evident reason that such affidavit is not competent information. It is merely hearsay. If the affiant were on the stand, he would not be permitted to testify to any such matter, and he will certainly be restricted in an ex parte affidavit, where he is subjected to no cross-examination."

instant case, where the affidavit, on information and belief, is that of a person other than the Attorney General.

In *Ludden* v. *State*, 48 N. W. 61 (Neb. 1891), a restraining order issued by a court was allegedly violated according to affidavits made by persons, other than the prosecuting officer, on information and belief.[68] Rejecting a contention that such affidavits sufficed, the court stated (p. 64):

> "A proceeding in contempt for acts not committed in the presence of the court is instituted by filing an information under oath *stating facts* constituting the alleged contempt . . . . The charge must be direct that the party has committed the act complained of. In all matters based on the oath of a party charging another with the commission of an offense by which he may be deprived of his liberty, the charge must be specific and direct. *Mere hearsay will not suffice.*" (Emphasis supplied.)

These requisites of proper and sufficient initiatory pleadings and positive allegations in criminal contempt proceedings[69] are mandatory jurisdictional requirements of Rule 42(b) under its specific provisions that criminal contempt

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[68] The rule is stated generally in 12 Am. Jur., Contempt, Sec. 68 thus:

"In most jurisdictions an affidavit on information and belief is wholly insufficient upon which to base constructive contempt proceedings, and no jurisdiction can be acquired by the court thereunder."

See 17 C.J.S., Contempt, Sec. 72(a), where the general rule is stated that "A sufficient initiatory accusation of affidavit in proceedings to punish contempts committed out of the court's presence is jurisdictional." See also *Muffly* v. *State*, 261 N. W. 560 (Neb. 1935). The sufficiency may be tested by motion to discharge the rule. 17 C.J.S., Contempt, Sec. 72, p. 90.

Moreover, the petition filed by the Attorney General was not verified. "It is the practice to verify the pleadings in criminal contempt." Cyc. of Federal Procedure (2d Ed.), Sec. 7261.

[69] Requirements of Rule 42(b) parallel procedural modes of Section 268 Judicial Code (28 U. S. C. A. 387) providing that in criminal contempts, the rule to show cause is premised upon lawful process, affidavit of some creditable person, or information filed by a district attorney.

shall be prosecuted upon notice which shall state the essential facts constituting the criminal contempt charge.

The record registers the fact that the pertinency of Rule 42 (b) to the instant proceeding was specifically directed to the attention of the Government's attorneys and of the court, and it likewise reflects their respective persistent attitudes not to be bound or governed thereby.

The Court's attention is respectfully directed to the admission of counsel for the Government (R. 196) that the District Court's order was patterned on Section 268 of the Judicial Code (28 U. S. C. A. 386) which deals exclusively with criminal contempts "to vindicate the authority of the Court and punish the act of disobedience as a public wrong." *Michaelson* v. *United States*, 266 U. S. 42. The Government then seeks to avoid the fact that Section 386 is limited to criminal contempt by avowing compliance with Section 389 (28 U. S. C. A. 389) which provides, in part, that "such proceeding may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914" (R. 196, 197). Even assuming that these "usages" are applicable to this case, it is clear that they would not sustain both civil and criminal contempt where, as here, the rule to show cause sought punishment only.[70] *McCrone* v. *U. S.*, *supra*, at p. 65.

In any case, the "usages" mentioned in Section 389 have, we submit, been superseded by Rule 42 (b) which has the same force and effect as acts of legislation. *Weil* v. *Neary*, 278 U. S. 160; *Cyc. of Federal Procedure* (2nd Ed.) 699; *United States* v. *Infusino*, 131 F. (2d) 617.

The attempt of the Government to evade the requirements of Rule 42 (b) is voiced by Government's counsel thus (R. 195, 196):

". . . the distinction between civil and criminal contempt is, as the Court has pointed out, a difficult

[70]Government's counsel too, tacitly admitted that these proceedings were dominantly criminal (R. 197).

> one. . . . In this case I think the simple answer is, since the complainant is the United States, or the people of the United States, that this contempt is both civil and criminal."

Since Rule 42 (b) involved the notice relating to criminal contempt, which may be invoked only by the sovereign government itself, certainly there can be no merit to the contention that the rule has no application to the Federal Government.

We submit that in the light of existing principles of law and under the plain language and underlying purpose of Rule 42(b) it was grossly erroneous upon an ancillary, single pleading calling for punishment only, and in disregard of the requirements of Rule 42(b), for the court below to enter a punishment for both civil and criminal contempt.

A clear perspective and understanding of the reason for the adoption of Rule 42 (b) involves the distinctions between civil and criminal contempt. Courts, text book authors and writers of legal periodicals are uniform in their observations that the law of contempt was, before the adoption by this Court of Rule 42 of the Federal Rules of Criminal procedure, in a confused and uncertain state, and this difficulty may be traced to attempted distinctions between civil and criminal contempt. See Swaysee, *Contempt of Court in Labor Injunction Cases* (1935), pp. 21-22; Frankfurter and Greene, *The Labor Injunction*, p. 127; Moskovitz, *Contempt of Injunctions*, 43 Columbia L. R. 780.

Because of the existence and persistency of this confusion Judge Learned Hand, in *McCann* v. *New York Stock Exchange*, 80 F. (2d) 211, 214, suggested a "simple and certain test" that would tend to eliminate the confusion. He said that the distinction could be "made plain if the judge enters an order in limine, directing the attorney *to prosecute the respondent criminally* on behalf of the court." (Emphasis supplied.)

The express purpose of Rule 42 (b), as stated by the Advisory Committee that drafted it, was to obviate the frequent confusion between criminal and civil contempt and the Committee adopted the suggestion made in the *McCann* case.

We are cognizant of the decisions of some Federal courts antedating the promulgation of Rule 42 (b) which support the right to prosecute both civil and criminal contempts in a single proceeding. *Kreplik* v. *Couch Patents Co.*, 190 F. 565 (C. C. A. 1, 1911); *Wilson* v. *Byron Jackson Co.*, 93 F. (2d) 577. But we submit that these cases are rendered completely inapplicable by the promulgation of Rule 42 (b).

Since prior decisions allowed the joinder of civil and criminal contempts and since, at very least, a portion of the confusion stemmed from such joinders, it is obvious that the plain purpose of the Supreme Court in adopting said rule was to effectuate a definite cleavage between the two classes of contempt and to provide for a criminal contempt proceeding which would be separate and distinct from one relating to civil contempt. Only if the separation is decisive may the confusion be dissipated.

The rule, in its requirement, to "describe it as such" denotes unequivocally that it must be a criminal contempt. To adopt the position of the Government that a proceeding for contempt which seeks solely to punish the alleged contemner and which seeks no remedial relief may be initiated as ancillary to the main cause and characterized as both civil and criminal, without regard to the rule, renders completely futile and meaningless the rule itself.

The explanation given by the Government for its conspicuous failure to comply with Rule 42 (b) is wholly untenable. To say, as the Government does, that the purpose and intent of Rule 42 (b) was met by the fact that during the course of the argument on the motion to vacate and dis-

charge the rule to show cause, the Government intended to prove both criminal and civil contempt, is wholly to misconceive the language and import of the rule. As indicated, the very purpose of the rule was to establish a definite cleavage between the two classes of contempt and to advise defendants in the pleading stages of the fact that they were to meet a criminal charge.

One of the obvious reasons why notice of the precise nature of the proceeding is required by Rule 42 (b) is that the procedures in, and incidents and consequences of, criminal cases are altogether different from those in civil cases.[71] Criminal contempt has been classed as a criminal offense.[72] In criminal contempts as in criminal cases the presumption of innocence obtains; proof of guilt must be beyond reasonable doubt; and the defendant may not be compelled to be a witness against himself.[73] A contemner in a criminal contempt proceeding and a criminal share the same fate.[74] Certainly the defendant is entitled to know of what procedures he can avail himself. In the past defend-

[71] In speaking of remedial relief, Frankfurter and Greene, *The Labor Injunction*, p. 128, states:

> "The burden of proof, the rules of evidence and the measure of damages will be drawn from the customary practice in civil litigation."

[72] *Michaelson* v. *United States*, 266 U. S. 42; *Gompers* v. *United States*, 233 U. S. 604, 610-11, where it is stated:

> "So truly are they crimes that it seems to be proved that in the very early law they were punished only by the usual criminal procedure . . ."

U. S. v. *Goldman*, 277 U. S. 229, 235:

> "The only substantial difference between such a proceeding for criminal contempt and a criminal prosecution is that in the one the act complained of is a violation of a decree and in the other the violation of a law."

[73] *Gompers* v. *Buck Stove & Range Co.*, *supra*, p. 444; *Michaelson* v. *United States*, *supra*; *Ex Parte Grossman*, 267 U. S. 87, 117.

[74] Frankfurter and Greene, *The Labor Injunction*, p. 59.

ants in contempt cases were placed in an impossible dilemma, since frequently the question of whether it was a civil contempt or a criminal contempt was not determined until the court of last resort had announced its decision.

In no other phase of jurisprudence did such difficult dilemmas exist. See, for example, *Helvering* v. *Mitchell*, 303 U. S. 391, 402, where the Court stated:

> ". . . That Congress provided a distinctly civil procedure for the collection of the additional 50 per centum indicates clearly that it intended a civil, not a criminal, sanction. *Civil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guaranties do not apply.*" (Emphasis supplied.)

Because the Government failed to proceed in the manner provided by and in compliance with Rule 42 (b), it is submitted that the District Court had no initiatory pleading upon which to premise either its rule to show cause, the hearing thereon or its judgments. The motion to vacate and discharge the rule to show cause should have been sustained. Moreover, the judgments of the Court were void.

VI

The Fines Imposed on the United Mine Workers of America and John L. Lewis Are Excessive and Are in No Way Related to Any Evidence Admitted at the Hearing.

As heretofore shown, Congress, in enacting the War Labor Disputes Act, carefully and deliberately limited the Government to criminal procedures expressly eschewing suggestions that injunctions should lie for interference with production in Government-seized enterprises. Consistent with any criminal act Congress imposed a fixed

penalty for violation, one year imprisonment or a fine of $1,000 or both. By blithely ignoring this Congressional mandate the Government has succeeded in imposing a judgment against John L. Lewis which is ~~ten~~ two times the limit fixed by Congress and a judgment against the United Mine Workers of America which is ~~thirty-five~~ seven hundred times the penalty fixed by Congress! And this, not after the full and careful trial prescribed by the Constitution and affording defendants safeguards that date back to the Magna Charta, but upon resort to the extraordinary process of an *ex parte* temporary restraining order.[75] We say that on the bare statement of the fore-going, undisputed facts there is an open and flagrant violation of the Eighth Amendment which prohibits the imposing of "excessive fines".

It is plain that fines imposed for civil contempt must be established by satisfactory evidence[76] and must be paid to or for the benefit of the injured party to the extent that he was injured.[77] Here, none of these essential requirements were met.

The Government arbitrarily picked out the figure of $250,000 a day in recommending the amount of the fine of the United Mine Workers of America (R., 321) and the court accepted the recommendation *in toto* without any apparent reason other than that the Government had recommended it.

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[75] "When a crime is formally charged, the accused is protected by safeguards which summarize experience. But if the charge is contempt of court, the judge, himself the accuser, determines 'guilt or innocence' . . . Contempt proceedings, in these industrial controversies, partake more of 'executive attempts at law enforcement' than of 'even-handed' justice". Frankfurter and Greene, *Congressional Power Over The Labor Injunction*, 31 Columbia Law Rev. 385, 412.

[76] 17 C.J.S. Sec. 95; *Judelshon* v. *Black*, *supra*; *Oakland Coal Co.* v. *Wilson*, *supra*."

[77] *Gompers* v. *Buck Stove & Range Company*, *supra*; *McCann* v. *New York Stock Exchange*, *supra*, 214.

The fines were not apportioned as between the civil and criminal contempts found to have been committed. Accordingly, it is impossible to state how much of the fines are to be assigned to the civil contempt in order to make whole whoever may have been damaged by that alleged contempt. Indeed, there is nothing by way of testimony indicating how much, if any, money damage plaintiff had sustained. True, the testimony of Mr. Haas (R. 295) and Dr. Hauser (R. 292) was addressed to the economic repercussions of the cessation of work in the mines, and imposing statistics were produced. But the testimony and statistics furnished by these two witnesses dealt in the main with losses in the national income, that is, with losses to various private enterprises—not parties to the case—and not with losses to the plaintiff seeking relief. Moreover, and this is of the first importance, that testimony was necessarily speculative in the extreme. It was premised on several unproved assumptions—basic among which was a conjecture as to how long the stoppage of work would continue, which events have repudiated.

Actually, there was undisputed testimony (R. 290)— and the court so found (R. 98)—that on November 20th, 1946, when the stoppage began there was on hand approximately 76 million tons of bituminous coal which would, at normal rate of consumption, last about thirty-seven days. This Court can take judicial notice of the fact that the miners returned to work within 17 days, on December 7th. Thus, even if we should accept the testimony of the Government's witnesses we would be forced to the conclusion that no civil damages have been proved.

Further, there is no direction that the fines be paid to the plaintiff and in the absence of such direction it must have been contemplated, that payment should be made to the Clerk of the District Court. (District of Columbia Code, Title 11, Secs. 330,331).

This Court may take judicial notice of the fact that the funds of the United Mine Workers of America belong to, among others, approximately 22,000 mine workers in Canada, approximately 75,000 anthracite miners in the United States in no way involved in the controversy, and approximately 25,000 maintenance and supervisory men and others, members of the United Mine Workers of America, who remained at work during the time in question.

No more convincing proof of the soundness of the reasons which prompted abolition of injunctive jurisdiction in labor disputes could be had than this grotesque result whereby the monies of these working men, in no way involved in this case and outside of the jurisdiction of the District Court for the District of Columbia, are directed to be paid over to the treasury of the District of Columbia for the relief and benefit, presumably, of the taxpayers in the District of Columbia.

A diligent search of the authorities fails to disclose that a fine of the tremendous magnitude here involved has ever been imposed by any court for any contempt, civil or criminal. Nor can we discover any instance where there has been such a completely disdainful disregard for elementary demands of justice and fair play which are grounded in our Constitution and which require some reasonable connection between alleged damage and remedial relief. We submit that for this error alone, even assuming the absence of any other error on the part of the court below, the judgments should be reversed.

VII

The Court Erred in Extending the Restraining Order on November 27th.

The manner in which the court below extended the original temporary restraining order over objection of defend-

ants is further evidence of the enthusiastic compliance by the court with every Government request, no matter how conspicuously contrary to law and how conspicuously contrary to fact. By its terms the original *ex parte* restraining order was to expire at 3:00 P. M., November 27th, after hearing scheduled to begin at 10:00 A. M. on the same day (R. 60). Thereafter, upon the Government's petition, the court issued a rule to show cause why defendants should not be punished for contempt which, too, and in conflict with the temporary restraining order, set the hearing and trial for 10:00 A. M., November 27th (R. 73).

At 10:00 A. M., November 27th, argument commenced on the motion to vacate and discharge the rule, that is, on the issues raised by the contempt proceedings and not on the preliminary injunction. During the course of that argument counsel for the Government requested an extension of the temporary restraining order (R. 158). Thereupon counsel for the defendants raised an objection based upon Rule 65 of the Federal Rules of Civil Procedure (R. 159, 160). It was pointed out to the court that under that rule "the motion for preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character" and that, accordingly, there cannot be "good cause" for extending an *ex parte* order simply because a hearing for contempt of the original order was then in process.

The court below had plainly erred in setting the two hearings for the same day and at the same hour by not giving the required precedence to the motion for the preliminary injunction. If contempt hearings based on violations of *ex parte* orders can thus defer the hearing for the preliminary injunction, then defendants in such cases can be effectively barred from their day in court for indefinite,

elongated periods. That, of course, is precisely why the rule requires that precedence be given to the hearing for preliminary injunctions.

Whatever may be said by way of justifying the court's granting of the Government's request for the extension, it is impossible to comprehend the court's putting its signature to the written order extending the injunction that was subsequently prepared by the Government. The written order contains an incredible misstatement of fact. It opens with the statement: "This cause having come on to be heard on November 27th, 1946, *on plaintiff's motion and prayer for a preliminary injunction*, and it appearing to the court that the hearing will not be completed until after three o'clock P. M., on November 27th, 1946, . . ." (R. 85). (Emphasis supplied.)

On November 27th, the day that order was signed, the hearing, we repeat, was not on plaintiff's motion for a preliminary injunction but on defendants' motion to vacate and discharge the rule—and that was the simple fact that no one could possibly have misunderstood. Indeed, after presenting the court with that written order counsel for the Government, having completed his argument on defendants' motion to vacate, stated, "We request Your Honor that the motion for a temporary injunction . . . be set down for trial before this Court on Friday morning" (R. 186), that being November 29th.

We submit that the order of November 18th expired by its own terms at three o'clock November 27th and that the order attempting to extend it was completely void. Accordingly, even on the assumption that the original order was not repugnant to the Constitution and was not issued in violation of the anti injunction statutes, and even if we assume that the court committed no error in finding defendants guilty of both civil and criminal contempt, and even if we assume that the fines imposed were not excessive and

were supported by competent evidence in the record, it would still be necessary to reverse the judgment of the court below and remand the cause for further hearing. That follows from the fact that the court imposed a fine on the United Mine Workers of America of $250,000 for each day that it allegedly contemned the order of November 18th, and in computing the number of days of alleged contempt the court added the period following 3:00 P. M., November 27th.

Conclusion

It is respectfully submitted, under the authorities cited and discussed in the foregoing arguments that the orders and judgments of the District Court of the United States for the District of Columbia should be reversed.

Respectfully submitted,

WELLY K. HOPKINS,
EDMUND BURKE,
T. C. TOWNSEND,
HARRISON COMBS,
M. E. BOIARSKY,
Counsel for United Mine Workers of America, John L. Lewis, Individually, John L. Lewis, President, United Mine Workers of America.

Of Counsel:
JOSEPH A. PADWAY,
HENRY KAISER,
JAMES A. GLENN.